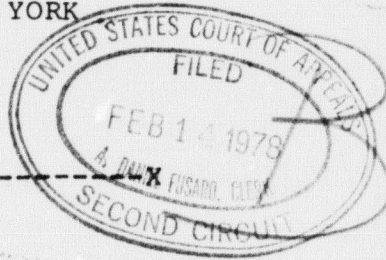


***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



Defendants-Appellees.

Docket No.
77-6219

Appendix To
BRIEF FOR
PLAINTIFF-APPELLANT

MARSHALL P. SAFIR
PRO SE
41 FLATBUSH AVENUE
BROOKLYN, NEW YORK 11217

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
MARSHALL P. SAFIR,

Plaintiff,

v.

AMERICAN EXPORT LINES, et al.,

Defendants.
----- X

MARSHALL P. SAFIR,

Plaintiff,

v.

ROBERT W. BLACKWELL, et al.,

Defendants.
----- X

Appearances:

MARSHALL P. SAFIR, pro se

ELMER C. MADDY and KIRLIN CAMPBELL & KEATING,
KOMINERS FORT, SCHLEFFER & BOYER, and
KURRUS & ASH for American Export Lines,
Lykes Bros. S.S. Co. and United States Lines

ROBERT T. BASSECHES and BARRETT, SMITH SCHAPIRO
SIMON & ARMSTRONG, BERGSON, BORKLAND, MARGOLIS
& ADLER, SHEA & GARDNER and FOLEY, HOAG &
ELIOT for American President Lines, Farrell
Lines, Prudential Lines, and PSS Steamship Co.

GILBERT S. FLEISCHER and DAVID G. TRAGER, United
States Attorney

DOOLING, D.J.

The 1977 action was commenced on May 26, 1977,

against the ocean carriers to enforce their alleged liability

ATP

under 31 U.S.C. § 231 to the United States. The ground of liability asserted is that the carrier defendants, by reason of their participation in a practice discriminatory against Sapphire Steamship Lines, Inc., were not entitled to payment of any construction or operating differential subsidy (46 U.S.C. § 1227) but have nevertheless filed claims for and received payment of such subsidy amounts from the United States, and that those subsidy claims must be held to be false, fictitious or fraudulent. Plaintiff of
sues in reliance on Clause (B)/ 31 U.S.C. § 232; that clause authorizes any person to bring a suit to recover the fraud damages and forfeiture provided in Section 231 "as well for himself as for the United States". Plaintiff has given to the United States the notice required by it
Section 232(C), by supplying/with a copy of plaintiff's Petition for a Writ of Certiorari and Appendix in Safir v. Kreps as comprising plaintiff's "disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." (The petition for writ was one of three addressed to the decision of the Court of Appeals for the District of Columbia Circuit, reported 551 F.2d 447. The petitions were denied October 3, 1977.) The United States within sixty days thereafter, declined in writing to enter the suit.

saying that it had concluded from plaintiff's submission that the central issue of plaintiff's allegations in the present 1977 action "is presently being litigated in the United States District Court for the District of Columbia in an action styled" Marshall P. Safir, plaintiff, v.

Juanita M. Kreps, et al., defendants, Civil Action No. 74-1474.

Plaintiff, then, is free under Section 232(C) to pursue the suit unless there is a defect in the court's authority to proceed, for Section 232(C) provides, in part, that

"The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Section 235 provides that suits to enforce liability under Section 231

"... shall be commenced within six years of the commission of the act, and not afterward."

In the period from March 29, 1965, until March 1, 1966, the Atlantic and Gulf American Flag Berth Operators (a "conference") had in effect rates for certain United States military cargoes which the Federal Maritime Commission (FMC) on December 12, 1967, held had been designed for the sole purpose of eliminating Sapphire Steamship

from the carriage of military cargo by unfair competition; these rates the FMC characterized as so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of 46 U.S.C. § 814.* Counsel for plaintiff and Sapphire promptly drew the attention of the Federal Maritime Administration, Maritime Subsidy Board to the FMC decision and to the provisions of 46 U.S.C. § 1227, and demanded that action be taken to recover all subsidy payments made after March 29, 1965, and to cease making subsidy payments currently. No action having been taken by the Maritime Administration plaintiff, Sapphire Steamship Lines and Arnold Weissberger commenced an action in the Eastern District of New York, 68 C 643, on June 24, 1968, to compel the Maritime Administration, Maritime Subsidy Board and the Secretary of Commerce to cease making subsidy payments to AGAFBO members and to initiate suits to recover from them subsidy payments therefore made. The district court dismissed the complaint, but on appeal the Court of Appeals held that the Maritime Administrator could not refuse to proceed against the AGAFBO members without at least considering the interest of the victim and was at

*The decision was not appealed.

least required to make a considered decision whether to recover the subsidies paid in the past, and that plaintiff had standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Safir v. Gibson, 2d Cir. 1969, 417 F.2d 972 (Safir I). A second appeal settled that, although current subsidies to the AGAFBO members would not be enjoined in the absence of a showing of violation of 46 U.S.C. §§ 814, 1227, the Maritime Administration was not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire but was to give the FMC's determination the effect of collateral estoppel; the court noted that the Maritime Administration could investigate the nature and extent of individual carriers' participation in the illegal action if it found that relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation, and, if so, how much, and from whom. Safir v. Gibson, 2d Cir. 1970, 432 F.2d 1370 (Safir II).

The Maritime Administration, Maritime Subsidy Board, conducted a proceeding (No.S-243) before its Chief Hearing Examiner and a Recommended Decision rendered on April 24, 1972, would have fixed liabilities as follows:

American Export Isbrandtsen Lines	\$169,000.
Moore-McCormack Lines, Inc.	1,135,000.
United States Lines, Inc.	3,452,000.

Plaintiff was dissatisfied with the decision, and after an unrelated injunction matter had been disposed of (2d Cir. 1972, 469 F.2d 1061) the Maritime Subsidy Board by decisions of April 9 and October 10, 1973, fixed the liabilities at the following amounts.

American Export	\$38,050.25
Bloomfield	121,893.67
Lykes	762,891.99
Mormac	386,776.56
United States Lines	1,061,704.76

Plaintiff sought to review the April 1973 decision of the Maritime Subsidy Board in the Court of Appeals for the Second Circuit, but by order of May 16, 1973, the application was denied. An appeal by the carriers to the Secretary of Commerce resulted in an order of September 9, 1974, adjusting the liability amounts "to reflect the effect of the United States Government action" in actively inducing the rate reductions in issue to its substantial financial benefit. The adjusted liabilities were:

American Export	\$ 18,160.82
Bloomfield	46,346.54
Lykes	381,446.00
Mormac	193,276.76
United States Lines	487,292.14

Plaintiff sought review of the liability determinations in the United States District Court for the District of Columbia; that action was dismissed but, on appeal to the Court of Appeals for the District of Columbia Circuit, the dismissal was reversed and the case remanded to the District Court to try the issues, which the Court of Appeals outlined as including the propriety of the administrative action in mitigating the penalties assessed and reducing the subsidy recovery to reflect the proportion of military cargo carried "by the predatory lines", and as extending to the arbitrariness of the precise action taken, determining whether the various factors other than those cited as justifying mitigation can properly be considered and whether in light of all factors appropriate for consideration, the administrative action was arbitrary, capricious, or an abuse of discretion on all the facts developed in the hearing before the Administrative Law Judge (Chief Hearing Examiner); the Court of Appeals left determination of the

applicable standards of review qualifiedly open for the district court to determine on remand, but indicated the view that the Secretary's decision to mitigate on the basis he expressed appeared to reflect a failure to come to grips with the difficulties in the evidence in the record, gave little assurance that his order resulted from a reasoned decisionmaking and might, upon the District Court's scrutiny of the record, show the necessity of a remand to the Secretary for a clarification of reasons. Safir v. Kreps, D.C.Cir. 1977, 551 F.2d 447.

1. Plaintiff moved on September 13, 1977, to amend the complaint in 68 C 643, which, as noted, sought to compel the Federal Maritime Administration, Maritime Subsidy Board, to stop paying subsidies to AGAFBO members and to recover from them any subsidies paid to them after March 25, 1965. The amendment would add a claim under 31 U.S.C. §§ 231 et seq., alleging, in addition to the earlier allegations of violations of 46 U.S.C. §§ 814, 817(b)(5) and 1227, and of consequent liability by virtue of 46 U.S.C. § 1227 to refund past subsidies to the United States,

that during the eleven months period of violation the carriers received over \$227,000,000 of subsidies

that in May 1971 after defendants were advised that a prima facie case of violation of Section 1227 had been made out, defendants continued to submit vouchers supporting claims for subsidies allocable to the eleven month period of violation knowing them to be false in that defendants, to their knowledge, were not entitled to subsidy payments while in violation of the provision of their subsidy agreements by which they agreed not to be parties to any agreement among carriers which is unjustly discriminatory or unfair to another American flag carrier, and defendants signed and submitted affidavits in support of their vouchers stating that they had fully complied with the subsidy agreement and regulations and were entitled to the payments requested, and submitted annual accountings asserting that they had complied with the terms of the subsidy agreement knowing that they had not done so.

Plaintiff argues that the amendment is proper and should relate back to the date the action was filed. Under Rule 15(a) plaintiff may amend only by leave of court, a leave that is to be freely granted when justice so requires; where amendment is allowable, the claim asserted relates back to the date of the original pleading provided that

"... the claim ... arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ..."

There is no reason to allow this closed case to be revived by amendment. The original complaint made no claim against any of the defendants. It did, however, clearly pray an adjudication

that the making of any subsidy payments to the AGAFBO carriers during the violation months was illegal under 46 U.S.C. § 1227, that continuing subsidy payments to the AGAFBO carriers should be forbidden, and that the public officer defendants should be directed to sue the AGAFBO members to recover the subsidy payments illegally made to them. However, the AGAFBO parties intervened some time before June 18, 1970, after the decision of the Court of Appeals in Safir II, in order to petition for a rehearing (432 F.2d at 145), and after that date were heard in the further district court proceedings in 68 C 643. Plaintiff raised in the case as well as before the Chief Hearing Examiner his point that the United States should recover all the subsidies, and that, on some basis, he should or participate in/benefit by the recovery, and in connection with plaintiff's motion by order to show cause of May 4, 1972, and the related appeal, there was discussion during oral argument on May 31, 1972, of plaintiff's possible qui tam interest and reference was made to the "False Claims Act" (31 U.S.C. §§ 231 et seq.) in the context of Connecticut Action Now, Inc. v. Roberts Plating Co., Inc., 2d Cir. 1972, 457 F.2d 81; plaintiff's affidavit of August 21, 1972, submitted in the Court of Appeals plaintiff, asserted that he had been actively concerned that the

public officials take proper safeguards to protect the interest of the United States

"... and his [plaintiff's] own in later action under 31 U.S.C. Sec. 231, 232, 233 & 235 after extent of these recovered are decided on."

Plaintiff presented, as an issue for the Court of Appeals to decide, the question of his "statutory interest under 31 U.S.C. Sec. 231-233, 235 in any forfeiture mandated by the violation of 46 U.S.C. Sec. 1227, Sec. 810 by the offending ocean carriers as Sec. 819 has been interpreted by [the Court of Appeals] decisions in Safir v. Gibson". Plaintiff argued in the affidavit, after quoting language from the brief before the Chief Hearing Examiner concerning the AGAFBO carriers' making the offending rate agreement despite the Section 810 compliance clause in the subsidy contracts, that

"The deceit is obvious. The respondents unlawful behaviour during that period violated both a clear provision in the subsidy agreement as well as an explicit statute and in presenting their claims for subsidy payments corresponding to that period the respondents received government monies to which they were not entitled. Moreover, in presenting the claims, the respondents were holding out that the provisions of Sec. 810 which are incorporated in the subsidy agreement had been complied with, in effect misrepresenting their compliance with its terms. Appellant in fact far exceeds the requirements of the doctrine in Marcus ... to justify his qui tam interest."

On this point, the Court of Appeals was clear (469 F.2d at 1063):

"Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the decision and we have no occasion either to approve or to disapprove it."

The statement complained of was

"Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under qui tam legislation. No statute authorizing a qui tam recovery or qui tam proceedings has been pointed to and the decision in Connecticut Action Now, Inc. v. Roberts Plating Company, Inc. ... makes it reasonably clear that the plaintiff has no qui tam interest in the Government's recovery under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227)."

The motion to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 must be denied. While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light

of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. Cf. Rosenberg v. Martin, 2d Cir. 1973, 478 F.2d 520, 526-527; United States v. Templeton, E.D. Tenn. 1961, 199 F.Supp. 179, 183-184.

2. By motions for summary judgment defendants challenge the False Claims Act complaint of 77 C 1093 on its merits.

Plaintiff's testimony was taken on September 28, 1977, with a view to determining what evidence or information he had communicated to the United States that was not already in its possession at the time of suit. He testified that he made available to the Government through the Maritime Administration Public Counsel in 1971 all the information that he then had to support the False Claims Act suit, 77 C 1093, and that he had not transmitted or offered any Government representative any new information since that time, none having been requested of him. Plaintiff

said he did have information to bring forward at the present time, based on the fact that ^{the} case, 77 C 1093, had been filed. Annex A sets forth the relevant parts of the testimony that he then gave about the content of the new disclosures to him. The new material, related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims, is neither germane to the False Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from "leaks" from the Watergate Special Prosecutor's office.

It is unanswerably clear that the Government had in its possession all the evidence and information upon which plaintiff's False Claims Act suit is based at the time such suit was brought. Within ten days after the offending rates were put in effect plaintiff made a twelve page statement to the Joint Economic Committee, Subcommittee on Federal Procurement and Regulation, in the course of its hearing on Discriminatory Ocean Freight Rates and Balance of Payments, describing in considerable detail, under the questioning of Senator Douglas, the AGAFBO "fighting rates" adopted "in an effort to drive non-AGAFBO members out of business ." Specific reference was

made to the fact that certain AGAFBO carriers were subsidized and Sapphire was not; the subcommittee was advised that "the Managing Director has been in touch with Sapphire on the matter and is attempting to collect data on this rate with a view toward possible investigation of it." In a May 1966 communication to the same sub-

committee plaintiff asserted that "American subsidized lines should be denied subsidy on that portion of their cargoes for which no foreign flag competition exists."

In March 1971 plaintiff presented to the Merchant Marine Subcommittee considering S.1220 (a bill that would have authorized certain appropriations) that it should not authorize appropriations to be disbursed without the considered decision mandated by the decisions of the Court of Appeals for the Second Circuit and provoked Senator Hatfield to inquire whether it would not be more appropriate to bring court action on the question of the disbursement of the funds.

These disclosures, to which must be added those incident to the proceedings before the Maritime Subsidy Board, the present district court, the Courts of Appeals of the Second and of the District of Columbia Circuits and the United States District Court for the District of Columbia, and the material underlying the original Federal

Maritime Commission decision on the rates, presented to the Government all the information and evidence bearing on the issues save for the matter of directing the Government to the contention that for the AGAFBO members to have filed claims for subsidy payments while they were operating in violation of Section 810 (46 U.S.C. § 1227) or in respect of the period during which they were operating in violation of the section was arguably to have filed claims "knowing such claim[s] to be false, fictitious or fraudulent" or claims which were supported by vouchers known "to contain any fraudulent or fictitious statement or entry." But even that very contention was laid before the Government with explicit reference to the False Claims Act in the August 21, 1972, affidavit in the Court of Appeals.

The Government, then, was on May 26, 1977, when suit was started, in possession of the evidence and information upon which the suit is based. It is equally probable that a great deal of the information and evidence possessed by the Government, and much of the impetus to action, derived from plaintiff.

That plaintiff is the source of a substantial part of the evidence and information that was in the Government's

possession does not authorize continuance of the action. United States and Aloff v. Aster, 3rd Cir. 1960, 275 F.2d 281, affirming Judge Hastie's decision, E.D.Pa. 1959, 176 F. Supp. 208, make clear that Section 232 prohibits "any qui tam action based on information already in the possession of the United States, regardless of the source from which that information has come." The present case, one in which plaintiff in substance directs the Government's attention to its possible rights under Section 231 as applied to the facts brought out in the Federal Maritime Commission and the Maritime Subsidy Board proceedings, resembles United States v. Armour & Co., D.C. 1956, 146 F.Supp. 546, aff'd, D.C. Cir. 1958, 254 F.2d 90. The Aster case was followed in United States ex rel. Vance v. Westinghouse Electric Corp., W.D.Pa. 1973, 363 F.Supp. 1038, 1042, with an intimation of reluctance. United States ex rel. Davis v. Long's Drugs, Inc., S.D. Cal. 1976, 411 F.Supp. 1144, held that Medicaid claims presented to the states were within the False Claims Act, but that the facts in the possession of the state in question should not be considered facts in the possession of the United States for Section 232(C) purposes. However, the court in Long's Drugs expressed "serious reservations" -

about the validity of Aster. The court considered that the clause in Section 232(C) was intended to deny the right to sue only to parasitical suitors who had derived their facts from the public record of the Government's own investigations and was not meant to exclude those who voluntarily furnished information to the Government before starting suit upon the Government's failure to do so. That, the court considered, flowed from the liberal interpretation of the Act adopted in United States v. Neifert-White Co., 1968, 390 U. S. 228. But Neifert-White was liberal in reading the statute as embracing a wide range of Government interests, and throws no light on the Court's attitude toward the clause in Section 232(C). And the statute itself answers the serious reservation of Long's Drugs about the validity of Aster. Under Section 232(E)(2) if the United States rejects the suit and the plaintiff presses it to a conclusion, the plaintiff may receive up to one-fourth of the recovery as "fair and reasonable compensation ... for the collection of any forfeiture and damages", plus the reasonable costs and expenses of suit. If the United States comes in and takes the suit over, however, then under Section 232(E)(1) the court may award the original suitor "an amount which

in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought." The award may not exceed one-tenth of the recovery. These provisions have taken the place of the older provision, Section 6 of the Act of March 2, 1763, 12 Stat. 698, (Revised Statutes § 3493) which gave the private suitor one-half the damages and forfeitures that he should "recover and collect" as well as the costs of the suit. The older statute gave the United States neither a right to notice of the suit's pendency, nor a right of intervention in it; its sole right was to one-half the recovery and the power to veto a withdrawal or discontinuance of the suit. See Bush v. United States, C.C. Oreg. 1882, 13 Fed. 625, 629; United States v. Griswold, D.Oreg., 1885, 24 Fed. 361, 366, aff'd, C.C.Oreg. 1887, 30 Fed. 762. In United States ex rel. Marcus v. Hess, 1943, 317 U.S. 537, the United States appeared only as amicus curiae, at the request of the Court (317 U.S. at 545). Under the present statute the United States is given control of the suit at its option, and it may altogether exclude the private suitor from participation in the conduct of the case. The emphasis

is on limiting the informer's award precisely to what he adds to the store of information and evidence that was in the Government's possession when the suit was started. That the private suitor, in the pursuit of his own interest and to secure a relief that he could obtain only through the Government, may have disclosed facts and evidence to the Government that arguably might also arm it to pursue a Section 231 claim against the defendants, does not create an exception to the provisions of Section 232(C), nor in principle should it. Plaintiff's submissions of evidence to the Federal Maritime Commission, to the Maritime Subsidy Board and to the Senate Subcommittees were directed to specific substantive reliefs to which plaintiff claimed entitlement for Sapphire and for himself by reason of his interest in Sapphire and its business. But the submissions were thereafter in the Government's possession for all purposes, including its determining from them the measure of its own rights, and what relief it would seek in its own considered judgment.

Since so much of Section 232(C) as deals with the prior effect of the Government's possession of the evidence and information on which the suit is based is treated as strictly jurisdictional, United States (by Greenberg)

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v. The Burmah Oil Co., Ltd., 2d Cir. 1977, 558 F.2d 43, 46, it follows that the action must be dismissed. In the circumstances it would not be proper to pass on the questions of fraud and of limitations presented by defendants.

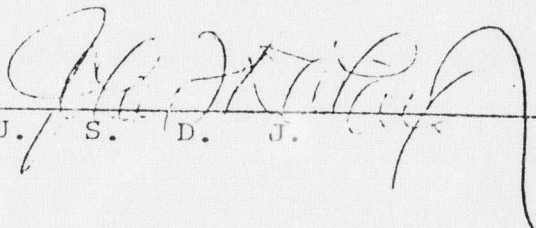
It is

ORDERED that the motions of defendants for summary judgment in 77 C 1093 are granted, and the motion of plaintiff to amend the complaint in 68 C 643 and to consolidate that action with 77 C 1093 is denied; and it is further

ORDERED that the Clerk enter judgment that plaintiff take nothing in 77 C 1093 and that the action is dismissed for want of jurisdiction.

Brooklyn, New York

December 20, 1977.


U. S. D. J.

A N N E X A

1

Safir

6

2 employee or representative of the government?

3 A I have offered it. It has not been requested
4 of me.

5 Q Will you tell us what you have offered to them?

6 A Well, I haven't offered anything specific to
7 them. I have information which now based on the fact that
8 this case is filed will be brought forward.

9 Q I now ask you to give us the information
10 which you intend to bring forward.

11 A Well, upon information and belief, at some
12 time in 1968 an arrangement was made between members of
13 this group and the then Republican Party for the considera-
14 tion of a considerable sum of money, to see to it that the
15 subsidies which formed the basis of a complaint filed in
16 1968, in June, that that case, if the Republican Party was
17 elected to office, would be made difficult for the plaintiff
18 to succeed.

19 Q May I ask you whether you have any documents
20 to support this arrangement that the Republican Party had?

21 A I have no documents, but I have -- that my
22 information came from -- I will put it this way. It came
23 in 1973, about October of 1973, by a telephone call from
24 a newspaper reporter who asked me whether I knew anything
25 about a deal involving approximately \$7,000,000 in which --

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Safir

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2 and he mentioned by name one Spyros Skouras, Senior,
3 had through someone in the Republican Party -- and I am
4 not sure whether it was Mr. Stans that he mentioned by
5 name or not -- had arranged for this \$7,000,000 to be
6 paid over, over a period of time, to parties within the
7 Republican Party for the purpose of settling or disposing
8 of the antitrust case which was then filed by the Trustee
9 in Bankruptcy of Safir Steamship Lines, and also my case,
10 which at that time was in the nature of mandamus and which
11 was the original action that I filed in 1968.

12

Q

Could you tell me the name of the newspaper

13

reporter?

14

A

The name of the newspaper reporter was --

15

his name was Louis Kohlmeier, and I understand that he is

16

a Pulitzer prize winning reporter who worked for the Wall

17

Street Journal at the time I first knew him, and at the

18

time he called to inquire about my information, about

19

this information, was working for the Chicago Sun Times

20

syndicate in Washington.

21

I told him at that time that like a husband

22

whose wife was cheating, I would be the last to know the

23

answer to his question, as to whether I had any information

24

on the subject. My answer to him was no, but from that

25

point on I knew that there would be a point in this

Safir

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2 litigation when under a False Claims Act amendment, in
3 one case or in a new case filed as this one is here,
4 that we are here today, filed last May, that new informa-
5 tion would be supplied to the government in order to firm
6 up the specific intent to defraud, which I felt as far
7 as my case was concerned, this form of contribution would
8 represent.

9 Q You say this inquiry was in 1973?

10 A Yes, sir.

11 Q Did you ever tell anyone in the government
12 about the inquiry?

13 A No.

14 Q Why didn't you tell them?

15 A Because at that time I had no proof, and I
16 had no basis on which to act, except and distinct from
17 perhaps a Special Prosecutor's office and others who
18 were interested at that time.

19 Mr. Kohlmeyer mentioned, however, if this
20 will be helpful to you, Mr. Fort, and it might be, that
21 certain of this information that he was basing his call
22 to me on was based on leaks from the Special Prosecutor's
23 investigation in the Nixon impeachment case. Make the
24 most of it.

25 Q So that what you are saying is that the

Safir

9

1

2 information in essence was in the possession of the
3 government at the time he called you, because he had
4 heard about it through leaks from the Special Prosecutor?

5 A If you think so. As I said, make the most of
6 it. I don't think so. I don't think that that could be
7 considered in the hands of the Attorney General, Department
8 of Justice, since they were not involved in the Special
9 Prosecutor's office.

10 Q Were any other companies mentioned by this
11 reporter?

12 A Not by name.

13 Q Now, return to the affidavit, Mr. Safir.

14 A Yes.

15 Q Paragraph 5, Page 7.

16 A I seem to have a problem there, Mr. Fort.
17 Paragraph 5?

18 Q Five begins on Page 6 and it goes on to Page 7.

19 A I beg your pardon. Go right ahead, sir.

20 Q I would like to read you a sentence from
21 that paragraph, starting off with "Thus, the conduct and
22 transactions which were in issue before the Maritime
23 Subsidy Board, as a result of the 1968 complaint and
24 are now res judicata, are the same as which formed the
25 basis for the proposed amended complaint."

Safir

33

1 I did, and there was no answer and then he called me
5 2 back at home.

3 Q Mr. Kohlmeyer?

4 A Yes. Now, I think I tried to get him back
5 at the Wall Street Journal, but he wasn't there and then
6 he called me and he told me that he was no longer with
7 the Journal, but with the Sun Times syndicate.

8 Q Do you remember what time of day you were
9 called by Mr. Kohlmeyer?

10 A I think it was late afternoon.

11 Q Where was your office at this time?

12 A No, he called me back at home.

13 Q What office did he call?

14 A He called the office at 41 Flatbush Avenue,
15 Brooklyn.

16 Q And where were you living at that time?

17 A I was living in 8 Southview Lane in
18 Kingspoint, New York. So there was a relay of calls
19 from my office to my home.

20 Q What are you using to place -- what in-
21 formation are you using to place the date of the call
22 some time in September or October of 1973?

23 A My own memory. Just my recall because of
24 the nature of what was going on at that time, the events
25

Safir

34

1 of the time and the timing of his statement that leaks
2 are coming out of the Watergate Hearings and he went
3 further, he went further on this thing, I haven't told
4 you all that he told me.

5 Q Before we get into the actual conversation,
6 I am just going for information that -- the information
7 which you base your memory of the date of the conversation.

8 A I did not quite finish that question.
9 I based it on the fact that the Watergate Hearings were
10 on, that as a special prosecutor -- no, I wasn't even
11 sure of that, that the Maritime, the head of the Maritime
12 Commission had been called by the Watergate Committee.

13 He said at that time or a few days prior
14 to that, Helen Bentley by name had been called by the
15 Watergate Committee, so I placed the timing to be more
16 accurate, perhaps others can too, to place it about the
17 time that she was called before the Watergate Hearings.

18 Q So the conversation was after she had
19 testified?

20 A After she testified and certain newspaper
21 type leaks had emanated.

22 Q How did the conversation begin, who spoke
23 first?

24 A He did. He said, do you remember me, I
25

Safir

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said, of course I remember you.

3

Q Could you give us the rest of the conversation.

4

as you remember it?

5

A Then he started to ask me questions. In fact,

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he said, have you felt that you are having a very difficult

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time in making progress on your case and I said, I sure

8

have felt it.

9

Q What was your understanding of what he meant

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by your case?

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A The case that I was pursuing in the Maritime

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Subsidy Board, S 243, which was the outcome of my initial

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action in 68 C 643 in the Eastern District of New York.

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Q He asked you a question and you responded.

15

Was that your only response to the question?

16

A Yes. I said, why do you ask. That was my

17

next question.

18

Q What was his response?

19

A He said, well, we are getting words and I

20

am quoting now on the basis of a conversation of six

21

years ago, so there is some license or liberty involved.

22

Q Is it six years or four years ago?

23

A Excuse me, '73 is four years ago. I was

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thinking of the first one. Anyway, in connection with

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the one of four years ago, I asked him, why do you ask

Safir

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and he said, because there are certain things emanating from the Watergate Hearings that show a relationship between your case and certain things that have happened in regard to campaign contributions and things like that.

He said, do you know of a payoff to Nixon at that time, he said, in the neighborhood of five and a half million dollars. I said, unheard of and I said, I would be the last to know if that were the case, because I mentioned in connection with being like a cuckolded husband, always being the last to know.

He said, did I see any relationship between the City of Baltimore and the problems I was having. I said, no. I said, why do you bring that up. He said, well, isn't it interesting to you that Andrew Gibson and Helen Bentley and also the Vice President of the United States comes from Baltimore.

I said, well, I cannot see what the relationship is. He said, well, there is evidence involved which we are hearing about that connects a payoff of this five and a half million dollars on your case, to the relationship of Andrew Gibson, who was a vice president of Prudential Grace Lines, and an employee of Skouras coming into the administration as the Maritime Administrator. A relationship between Helen Bentley,

Safir

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2 a Baltimore reporter, becoming the head of the Federal
3 Maritime Commission and the vice president.

4 So, I said, I still cannot see the relation-
5 ship between the vice president and these people. He
6 said, well, Skouras is a Greek. I said, that is right,
7 or Greek extraction. He said, well, we hear it down
8 here and this is what he said, that for the money that
9 he paid into the Nixon administration to buy your case
10 and the problems that you are having, he additionally
11 recommended to Nixon at the time that he would like if
12 his Greek-American compatriot becomes the vice president
13 of the United States for the same five and a half million
14 dollars.

15 I said, I find that very hard to believe,
16 but that is a lot and if the next time I am in Washington,
17 I will be very glad to discuss this thing further and
18 I did. I came down to Washington soon thereafter, I
19 came down, I called him up and I met him in his office
20 at this National Press Building.

21 Q Are we going onto another conversation?

22 A Yes. We are going onto another conversation.

23 Q All right. Let's go back to the telephone
24 call to you. Did Mr. Kohlmeier tell you where he had
25 gotten this information?

Safir

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2 A No, he did not.

3 Q Did he indicate that he had gotten it from
4 the testimony at the hearings?

5 A No, he did not. He indicated that it came
6 in the form of a leak.

7 Q From --

8 A From one of the bureaus, apparently some
9 agency, apparently the special prosecutor or the Ervin
10 Committee at the time. I don't know, but it was a kind
11 of a leak thing that he was trying to check out, as to
12 whether I knew anything about it.

13 Q You mentioned that he was using the pronoun,
14 we have gotten this information.

15 Do you know if he was working with anyone
16 else in this investigation?

17 A I don't know.

18 Q Did he mention any other reporter's name?

19 A He did not.

20 Q Did he tell you when Mr. Skouras had been
21 in contact with Mr. Nixon?

22 A He did not.

23 Q Did he mention any dates --

24 A Well, there is a determining factor in
25 that, because Mr. Skouras died soon after Nixon came

Safir

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2 magnificent sum out in order to presumably settle the
3 antitrust case, and see to it that the subsidies not be
4 withheld from the lines, from the steamship lines, who
5 were then receiving them and who were apparently guilty
6 of the violation.

7 Q Have you had any contacts with Mr. Kohlmeyer
8 since your October or September, 1973 telephone conversation?

9 A Yes. I mentioned the fact that I visited with
10 him a month or two or three thereafter.

11 Q Do you remember if it was in 1973 or 1974?

12 A It might have been in early '74. I told him,
13 I told you that he had an office, he was in this little
14 office all by himself in that building.

15 Q What building is that?

16 A National Press Building. Apparently he was a
17 pipe smoker, because the room smelled like a gas bin.
18 You could not breathe in it.

19 I said, look, I am prepared to cooperate
20 and help you on this thing, if you want some help. I am
21 surprised that you hadn't gotten back to me earlier.

22 He had nothing much to say. He looked like
23 he was unhappy with the whole conversation, and perhaps
24 he shouldn't have called me in the first place.

25 So at that point I decided that was the end

Safir

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2 of it, at least for then, and I certainly -- I had
3 nothing further to go on. Everybody and his brother
4 was investigating everybody else at that particular time,
5 and I had my own problems, most of which were based on
6 the ongoing fight with you people.

7 So I did nothing further about it.

8 Q Had you initiated this meeting?

9 A The second meeting, yes, it was me.

10 Q And do you remember what Mr. Kohlmeyer said?

11 A He said he would think about going further
12 with it, and that he would get in touch with me, which he
13 never did.

14 Q Did he ask you any additional questions?

15 A Not a one.

16 Q Did he give you any additional information?

17 A I don't recall.

18 Q Did he give you any documents?

19 A No.

20 Q Do you remember him giving you any more
21 details or mentioning any names?

22 A I said no. He was reluctant to, from being
23 practically garrulous in the telephone conversation, he
24 was very reluctant to do any talking on that visit.

25 Q Do you remember how long this second meeting

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARSHALL P. SAFIR,

Plaintiff,

AFFIDAVIT

-against-

ROBERT J. BLACKWELL, Assistant Secretary for
Maritime Affairs, United States Department
of Commerce, Successor to and Substituted
for James W. Gulick and Andrew Gibson, former-
ly Acting Maritime Administrators, James S.
Dawson, Secretary, Maritime Subsidy Board,
Maritime Administration, United States Depart-
ment of Commerce, JUANITA KREPS, Secretary of
Commerce of the United States, Successor to and
Substituted for C. R. Smith and Maurice Stans,
former Secretaries of Commerce,

68 Civ. 643
(JFD)

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
AMERICAN PRESIDENT LINES, LTD. LYKES BROS.
STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES,
UNITED STATES LINES, INC., FARRELL LINES, INC.,
BLOOMFIELD STEAMSHIP CO., PRUDENTIAL GRACE LINES,
INC. and PRUDENTIAL STEAMSHIP CO., INC.,

Carrier Defendants.

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UNITED STATES OF AMERICA, ex rel MARSHALL P.
SAFIR and MARSHALL P. SAFIR,

77 Civ. 1093
(JFD)

Plaintiffs,

-against-

AMERICAN EXPORT LINES, INC., ET AL.,

Defendants.

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STATE OF NEW YORK)
COUNTY OF KINGS)

MARSHALL P. SAFIR, being duly sworn,

Att. B

deposes and says:

1. On or about June 24, 1968, the first above captioned action was initiated by filing a complaint in this Court. In essence, the action sought to require the responsible officers of the United States Government to discontinue subsidy payments to the following carriers:

American Export Isbrandtsen Lines, Inc.
American President Lines, Ltd.
Bloomfield Steamship Co.
Farrell Lines Incorporated
Prudential Grace Lines, Inc.
Lykes Bros. Steamship Co., Inc.
Moore-McCormack Lines, Inc.
Prudential Steamship Co., Inc.
United States Lines, Inc.

and to recover subsidy payments already made on the ground that such carriers had violated Section 810 of the Merchant Marine Act (46 U.S.C. Sec. 1227) by engaging in practices in concert which were unjustly discriminatory or unfair to Sapphire Steamship Lines, Inc.

2. At the time I filed the 1968 action, I had not made available to the United States Government, and the United States Government did not have in its possession, all of the evidence and information necessary to establish that such carriers had violated Sec. 810 of the Merchant Marine Act. Most significantly, Sapphire Steamship Lines status as a common carrier on established trade routes from and to the United States.

3. Early in 1970, the above carriers intervened in the action I had instituted to seek reconsideration of the decision of the Court of Appeals holding that the Secretary of Commerce was estopped from reconsidering the Federal Maritime Commission's findings of fact in concluding that the carriers had violated Section 15 of the Shipping Act and that the Commission's findings would constitute a violation of Section 810 of the Merchant Marine Act, subject only to proof that the carriers were receiving operating differential subsidies during the relevant time and that plaintiffs were citizens of the United States who could meet certain statutory criteria. Safir v. Gibson, 432 F2d 137 (2d Cir. 1970).

They have since participated as defendants in the proceeding. From 1969 on, the defendant carriers have participated as respondents in Maritime subsidy Board proceedings. They have also participated as intervening defendants in related proceedings in the District of Columbia.

4. On various dates in 1971, in connection with hearings (MSB Docket S-243) before the Maritime Subsidy Board, I made available to the government through Michael J. McMorrow, Esq., of the Federal Maritime Administration, all the information in my files and the files of Sapphire SS Lines; and, as the moving party in the investigation, participated throughout the

hearings which took two and one-half years.

During those hearings, Mr. McMorrow stated "...in the present case, and notwithstanding the inclusion of the requirements of Sec. 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. Once the board was involved, and only through the behest of Mr. Safir, the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of the day they first began, without any overture to the Maritime Administration, the unlawful behavior." (emphasis added).

5. As a result of my oral and documentary evidence and later participation in oral argument before the Board, the criteria for the finding of a violation as contoured in Safir v. Gibson, 1970 supra was met. On April 16th, 1973, the offending carriers were found to have violated the act by the MSB and this finding was affirmed by the Secretary of Commerce in September 1974.

6. The hearings before the Maritime Administration, therefore, were an outgrowth of the proceedings which I initiated in 1968. Even prior to the commencement of such hearings, I had expended considerable sums in the prosecution

of the 1968 action for attorneys' fees and other costs and expenses. Also my own personal resources were seriously depleted by the need to honor various guarantees and other investments and obligations which I had assumed in connection with Sapphire Steamship Lines. Thus, as a direct result of the predatory action by the above named carriers, I was forced to continue this action on behalf of the United States without counsel. In truth, the United States has always been the real party plaintiff in this case. Although the 1968 complaint was not formally amended to allege a cause of action under the False Claims Act (31 U.S.C. 231 et seq.) prior to the time I provided the government with the information necessary for a finding of violation of Sec. 810 of the Merchant Marine Act, I had made known orally and in writing on numerous occasions to the government and to the offending carriers my contention that, irrespective of any inclination towards leniency on the part of the responsible government officials, I had the right, on behalf of the United States, to enforce its full legal rights under its subsidy contracts with these carriers and that I had the right to remuneration in the nature of a qui tam allowance for my services on behalf of the government. I understand that amendments adding additional claims for damages have uniformly been held to relate back and not to introduce new causes of action (Vann v. United States, 420 F.2d 968 (ct. Cl. 1970); J. L. Simmons Company, Inc.

v. United States 412 F.2d 1369 Ct. Cl. 1969); Tabacalera Cubana v. Faber Coe & Gregg, Inc., 379 F. Supp. 772 (S.D.N.Y. 1974); and most significantly United States v. Templeton, 199 F. Supp. 179 (E.D. Tenn. 1961).

7. Indeed, it is only because the government ~~agency~~ ^{upon its own responsibility} avoided the normal course of instituting a legal action for breach of the subsidy contracts by adopting the anomalous procedure of holding administrative hearings to decide whether to sue and then ~~settling~~ before suit was instituted that ~~they~~ in effect, avoided the whole issue of whether the carriers filed false vouchers for subsidies.

8. As alleged in the proposed amended complaint, each of the defendant carriers had entered into subsidy contracts with the government prior to its violation of the Merchant Marine Act in which it expressly agreed (in haec verba with Sec. 810 of the Merchant Marine Act) that it would not

"engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

Each had expressly agreed that no payment or subsidy of any

kind would be made if it violated the above quoted provision. Each voucher which it submitted for a subsidy payment was accompanied by the affidavit of an officer swearing that he was familiar with the terms of the agreement, that the carrier had fully complied with them and was entitled to the payment requested. The subsidy payments to particular carriers during relevant periods were a part of the record before the Maritime Subsidy Board. Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board as a result of the 1968 complaint and are now res judicata are the same as which form the basis for the proposed amended complaint. The amendment conforms the pleadings to the proof and makes appropriate changes in the complaint to reflect the chronology of events and additional claims for damage under the False Claims Act (31 U.S.C. Sec. 231 et. seq.).

6. On May 26th, 1977, I filed a complaint and affidavit in this Court (77 (Civ. 1093) which asserted a claim against the defendant shippers under the False Claims Act (31 U.S.C. 231 et. seq.). This action was filed to foreclose technical statute of limitations defenses and plaintiff informed the Court that before or soon after the resolution of certain issues related hereto in the Supreme Court of the United States, that this amended complaint would be filed. The proposed amended complaint incorporates this

asserted claim. A notice of pendency was accordingly sent to the Attorney General, who in June of this year declined to enter an appearance herein, waiving the government's rights to prosecute under 31 U.S.C. Sec. 232(c).

7. Since common issues of fact and law are involved, the two proceedings should be consolidated.

WHEREFORE, I respectfully request leave to serve the attached amended complaint in the 1968 action and for consolidation of the above proceedings.


MARSHALL P. SAFIR

Sworn to before me this

13 day of September, 1977.


Notary Public

BITA L. PAFFANINI
NOTARY PUBLIC, State of New York
No. 30-3032680
Qualified in Nassau County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA, ex rel
MARSHALL P. SAFIR and MARSHALL P. SAFIR,

Plaintiffs,

68 Civ. 643
(JFD)

- against -

ROBERT J. BLACKWELL, Assistant Secretary for
Maritime Affairs, United States Department
of Commerce, Successor to and Substituted
for James W. Gulick and Andrew Gibson, former-
ly Acting Maritime Administrators, James S.
Dawson, Secretary, Maritime Subsidy Board,
Maritime Administration, United States
Department of Commerce, JUANITA KREPS,
Secretary of Commerce of the United States,
Successor to and Substituted for C. R. Smith
and Maurice Stans, former Secretaries of
Commerce,

AMENDED
COMPLAINT

Defendants,

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
AMERICAN PRESIDENT LINES, LTD. LYKES BROS.
STEAMSHIP COMPANY, INC., MOORE-McCORMACK
LINES, UNITED STATES LINES, INC., FARRELL LINES,
INC., BLOOMFIELD STEAMSHIP CO., PRUDENTIAL
GRACE LINES, INC. and PRUDENTIAL STEAMSHIP CO., INC.,

Carrier Defendants,

- - - - - X

Plaintiffs by their attorneys,

for their amended complaint, allege, as follows:

FIRST: This action arises and this Court has juris-
diction by virtue of the following statutes: 46 U.S.C. sec.1227,
(Merchant Marine Act of 1936); 5 U.S.C. sec. 702, 703, 704, 706
(the agency generally); 28 U.S.C. sec. 2201, 2202 (declaratory
judgment); 28 U.S.C. sec. 1301 (jurisdiction) and 31 U.S.C.

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sec. 231, 232, 233, 235 (False Claims Act).

SECOND: At all relevant times, plaintiff, Marshall P. Safir, has resided in the County of Nassau, State of New York and in the Eastern District of New York. Plaintiff is a citizen of the United States and at all relevant times was a stockholder and officer of Sapphire Steamship Lines, Inc., and personal guarantor of certain of its obligations. At all relevant times, Sapphire Steamship Lines, Inc. was a Delaware corporation, having its principal place of business in the County of Kings, State of New York and in the Eastern District of New York.

THIRD. Defendant, Robert J. Blackwell, is the Assistant Secretary for Maritime Affairs in the United States Department of Commerce and is the successor to James W. Gulick and Andrew Gibson, former acting Maritime Administrators for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FOURTH: Defendant, James S. Dawson, Jr., was during the relevant period and still is the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 26 Federal Plaza, New York, New York.

FIFTH: Defendant, Juanita Kreps, is the Secretary of Commerce of the United States, and is the successor to C. R. Smith, Maurice Stans, Peter Peterson, Frederick Dent, and Elliot Richardson, former Secretaries of Commerce.

SIXTH: Defendants, American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines, Inc., Prudential Grace Lines, Inc., Lykes Bros. Steamship Company, Inc., Moore-McCormack Lines, Inc., Prudential Steamship Co., Inc. and United States Lines, Inc. ("the defendant carriers") are contracting American Flag common carriers which at all relevant times herein have received and except for Bloomfield Steamship Company and United States Lines, Inc. are now receiving operating differential subsidies within the meaning of Section 810 of the Merchant Marine Act of 1936 (46 U.S.C. §1227).

SEVENTH: Atlantic and Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO") was at all relevant times herein a conference of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD"), which has been approved under Section 15 of the Shipping Act of 1916, as amended (46 U.S.C. §814). Each of the defendant carriers was, during the relevant period herein, a member of AGAFBO.

EIGHTH: On May 6, 1965, the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) instituted an investigation of the practices surrounding the

procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American Flag Berth Operators), TPAFBO (Trans-Pacific American Flag Berth Operators), WCAFBO (West Coast American Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transport Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York, and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

NINTH: On December 12, 1967, the Federal Maritime Commission filed its decision, Docket No. 65-13, in which it found and concluded as follows concerning the rates of the Atlantic and Gulf American Flag Berth Operators (AGAFBO):

1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to Section 18(b)(5).

2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of Section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated Section 15 by knowingly setting rates

which were contrary to Section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

TENTH: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

ELEVENTH: At all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessels registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the members of AGAFBO who are not entitled to receive them. Subsidies are provided for by 46 U.S.C. §§1171 through 1182 inclusive, and §§1191 through 1204 inclusive, and are referred to as operating-differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U.S.C. §§1151 through 1161.

TWELFTH: Section 810 of the Merchant Marine Act (46 U.S.C. §1227) provides as follows:

"SEC. 1227. AGREEMENTS WITH OTHER CARRIERS FORBIDDEN; WITHHOLDING SUBSIDIES; ACTIONS BY INJURED PERSONS FOR DAMAGES.

It shall be unlawful for any contractor receiving an operating-differential subsidy under Sections 1171-1182 of this title or for any charterer of vessels under Sections 1191-1204 of this title to

continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

THIRTEENTH: In accordance with Attachment I hereto, the members of AGAFBO received \$227,686,369.33 during the period of violation.

FOURTEENTH: On December 21, 1967, the plaintiffs requested the Maritime Administration to desist from making any further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO on the grounds that

in the specific instance of the Sapphire findings by the Federal Maritime Commission a violation of Section 15 of the Shipping Act of 1916 could be proven to be a violation of Section 810 of the M.M.A. of 1946 as well.

FIFTEENTH: Although defendants stated that they would take whatever action was deemed appropriate, no action was taken to either request documentary proof of plaintiff Safir's allegations of the ability of Sapphire SS Lines to meet the criteria for a finding of an 810 violation, or to recover subsidies which had been paid since March 25, 1965, or to refrain from continuing to make further subsidy payments.

SIXTEENTH: On June 24th, 1968, plaintiff Safir and others filed the original complaint in this Court to compel agency action on the grounds that a violation of the Shipping Act sec. 15 was in the circumstances of the Sapphire case, a violation which required the invocation of sec. 810.

SEVENTEENTH: This Court dismissed the complaint for failure to state a claim on which relief could be granted, and was reversed in *Safir v. Gibson* 417 F.2d 972. The Court of Appeals held that the construction differential and operating differential subsidy payments subject to recovery were those paid out during a period of eleven months in 1965-1966.

EIGHTEENTH: Immediately following this reversal and remand, the Maritime Administration instituted an investigation posing the question whether sec. 810 had been violated.

NINETEENTH: Dissatisfied with this procedure, plaintiff Safir herein moved this Court once again for injunctive relief, ^{The Court hereby} stating that the Court of Appeals in Safir v. Gibson supra had not found that a violation of sec. 15 was a violation of sec. 810 in the Sapphire case.

TWENTIETH: On February 26th, 1970, in Safir v. Gibson 432 F.2d 137, the Court of Appeals reversed, holding that collateral estoppel would exist in this case subject only to proof that the AGAFBO Lines were receiving operating differential subsidies at the time of the violation and that the carrier adversely affected was "a citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established routes from and to a United States port or ports.

TWENTY-FIRST: The MSB hearing in Docket 243 was reinstituted to give collateral estoppel effect to a finding of violation subject to this proof. And on February 16th, 1971, at a prehearing conference, plaintiff Safir offered to

give this proof to the government, and on March 16th, 1971, May 6th, 1971 and June 15th, 1971, gave sworn testimony and documentary evidence to prove that the criteria had been met.

TWENTY-SECOND: On May 6th, 1971, Administrative Law Judge Paul Pfeiffer informed the respondent lines that a prima facie case for a violation of sec. 810 had been made which would call for the recovery of subsidies paid during or allocable to the period of violation.

TWENTY-THIRD: In spite of the above and immediately thereafter, commencing on or about May 27th, 1971 and through June 12th, 1971, the violating carriers submitted vouchers representing the balance amounts of claims for subsidies allocable to the 1965-66 period, and these were paid out until this Court issued an order restraining the Maritime Subsidy Board from such disbursement unless adequate measures were taken to protect the United States. Plaintiff alleges that these carriers well knew these claims were false.

TWENTY-FOURTH: On April 16th, 1973, MSB issued its final decision that all carrier defendants herein had violated sec. 810. It also held it had discretion to mitigate subsidy recovery. The defendant carriers petitioned the Secretary of Commerce for review and Secretary Dent affirmed the finding of

violation against all of them. He further mitigated the penalties, however. Neither decision included a referral to the Department of Justice for prosecution under the False Claims Act.

TWENTY-FIFTH: At all times ^{during 1974-1975} since 1972 in ^Naction to escrow the proceeds of ship sales in this docket 68-C 643, all defendants knew that plaintiff Safir intended to exercise his rights under 31 USC 231 et seq, if the Secretary of Commerce sought recovery in an amount less than demanded in the original complaint herein.

TWENTY-SIXTH: That in the original complaint, plaintiff Safir demanded judgment for the following relief:

"C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made....".

TWENTY-SEVENTH: That Articles II-30 and II-31 of each operating differential subsidy contract trigger the defaults and termination terms upon the finding of such violation.

TWENTY-EIGHTH: That Article II-30(a) of the operating differential subsidy agreement provides that the

operator furnish a bond--"...to be conditioned upon the true and faithful performance of all and singular covenants and agreements of the operator contained in this agreement, and particularly upon the refund by the operator to the United States of any amount by which payments on account of the operating differential subsidy, including wage subsidy, shall exceed the amount determined to be payable to the operator under the audits being made pursuant to Article II-20 of this agreement...". --"The amount of such bond, or of United States government securities furnished in lieu thereof shall be adjusted from time to time...". Plaintiff alleges that these securities and deposits are inadequate for the recovery sought herein.

TWENTY-NINTH: That Article II-30(b) states as follows:

"b) In the event the operator is unable for any reason to furnish either the bond or pledge the securities in accordance with Article II-30(a), the United States shall withhold such subsidy payments as it deems appropriate to secure performance of this agreement and provide protection against overpayments of operating differential subsidy."

Plaintiff alleges that this has not been done.

THIRTIETH: That Article II-31 specifically reserves

the government's rights to proceed to recover under the Act (46 USC 1227) and other pertinent statutes. Plaintiff alleges that 31 USC 231 et seq is the pertinent statute in this instance.

THIRTY-FIRST: On various dates commencing in or about March 1965, each of the defendant carriers submitted vouchers for subsidy payments to the Maritime Administration pursuant to operating-differential subsidy agreements between such defendant carriers and the United States.

THIRTY-SECOND: On various dates commencing in or about March 1965, the defendant carriers, other than Bloomfield Steamship Company, submitted vouchers for subsidy payments to the Maritime Administration pursuant to

(continued following page)

construction-differential subsidy agreements under Title V of the Merchant Marine Act and on vessels acquired under the Merchant Ship Sales Act of 1946, pursuant to Section 704 of the Merchant Marine Act, between the defendant carriers and the United States.

THIRTY-THIRD: Each of the foregoing agreements provided in part substantially as follows:

II-15. Preference and Conference Agreements.

* * *

(b) The Operator agrees not to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

* * *

II-18. (e) No payment or subsidy of any kind shall be paid to the Operator if it shall violate the provisions of Article II-15(b) of this Agreement.

* * *

II-19. Limitations upon Subsidy Payments. Notwithstanding any other provision of this Agreement, no payment of operating-differential subsidy shall be made with respect to any of the following:

* * *

(c) Expenses incurred while the Operator is for any reason ineligible for the accrual of a subsidy under the Act;

(d) Expenses incurred in connection with a voyage made by any subsidized vessel during any period when such vessel is for any reason not eligible for a subsidy under the Act;

* * *

II-22 Events of Default. The following shall constitute events of default under this Agreement.

(a) Any material misrepresentation wilfully or negligently made by the Operator in connection with this Agreement whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise, or any wilful or negligent failure by the Operator to disclose material information.

(b) The occurrence of any event causing the Operator to be ineligible for an operating-differential subsidy.

THIRTY-FOURTH Each of the vouchers submitted by the defendant carriers pursuant to such agreements included an affidavit which states in substance as follows:

I, - - - - - , being duly
(name of company official)
sworn, depose and say, that I am - - - - -
- - - - - of the - - - - -
- - (title) - - - - -
- - - - - (herein referred to as the
(operator)
"Operator"), and as such am familiar with (a)
provisions of the Operating-Differential Subsidy
Agreement, Contract No. - - - - - , dated
as of - - - - - as amended, to which
the Operator is - - - - -; and (b) the regulations
governing the - - - - - of operating-differential
subsidy for - - - - - vessels, Part 252, Title
46, C.F.R.; and (c) the operation of the vessels
covered by said Agreement and regulations; and
(d) the accounts, books, records, and disburse-
ments of the Operator relating to such operation.

Referring to the public voucher dated

terminated during the , covering voyages
 commencing and ending
 , and attached sub-
 mitted by said Operator concurrently herewith
 for a payment on account in the sum of
 under said Agreement. I
 further depose and say that, to the best of
 my knowledge and belief, the Operator has
 fully complied with the terms and conditions
 of said Agreement and regulations, applicable
 orders, rulings and provisions of the Merchant
 Marine Act, 1936, as amended, and is entitled,
 under the provisions of said Agreement and
 regulations, orders and rulings, applicable
 thereto, to the amount of the payment on
 account requested.

THIRTY-FIFTH: Each of the foregoing vouchers was
 false in that each of the defendant carriers well knew that it
 had not complied with the paragraph designated II-15(b) above in
 its agreement with the United States, it knew that it was not
 entitled to any payment or subsidy of any kind, in view of the
 provisions of II-13(e) of such agreement, and it knew that events
 of default had occurred under paragraph II-22 of such agreement
 in that it had made material misrepresentations, had failed to
 disclose material information and was, in fact, ineligible for
 subsidy under the express terms of its agreement. Moreover, it
 well knew that it had violated §310 of the Merchant Marine Act
 (46 U.S.C. §1227) and, accordingly, that it was not entitled to
 receive the subsidy for which it submitted vouchers.

THIRTY-SIXTH: Pursuant to such agreement, each of
 the defendant carriers was required to submit and, upon informa-

tion and belief, did submit an annual accounting, including an affidavit by its chief financial officer that it had fully complied with all of the terms and conditions of its agreement in the manner and at the times therein required. Upon information and belief, said defendant carriers well knew that it had not complied with the paragraph of such agreement designated II-15 above.

THIRTY-SEVENTH: The total amount of subsidy payments received by these defendant carriers in response to false vouchers is presently unknown to plaintiff. The total amount of payments paid during the relevant period such defendant carriers were in violation of sec. 810 of the Merchant Marine Act (46 U.S.C.sec. 1227) is as set forth in Attachment I, annexed hereto. The exact amount of subsidy payments attributable to the relevant period is presently unknown to plaintiff.

WHEREFORE, the United States ex rel Marshall P. Safir and Plaintiff Safir demand judgment for the following relief:

A. A judicial declaration adjudicating that all carrier defendants who were found to have violated sec. 810 of the Merchant Marine Act of 1936 during an eleven-month period and who filed claims for payment of both construction and operating subsidies during that period or soon thereafter violated 31 U.S.C.231 as well by the submission of false

vouchers knowing them to be false.

B. A judicial declaration adjudicating that all of the carrier defendants who were found to have violated sec. 810 during an eleven-month period in 1965-66, and who filed final segments of those vouchers for operating differential subsidies in 1971, violated 31 U.S.C.231 as well when the United States paid false claims submitted by the defendant carriers who knew them to be false.

C. That the Secretary of Commerce be ordered to declare the defendant carriers in default of their ODS agreements.

D. That the Secretary forthwith be ordered to protectively attach the capital construction accounts of the violating carriers and all other bonds and sureties as provided in Article II-30 ODSA.

E. That the Secretary be ordered to offset all subsidies accrued but unpaid due the defendant carriers herein.

F. That the Secretary be ordered to withhold all current payments pending the marshalling of funds necessary to make the government whole for the subsidies illegally paid.

G. That judgment be granted in favor of the

United States for twice the amount of construction and operating differential subsidy payments received by the defendant carriers, pursuant to false vouchers as aforesaid, plus the statutory amount of two thousand dollars (\$2,000.) for each false voucher, and that plaintiff be awarded costs and disbursements including an allowance pursuant to the provisions of 31 U.S.C.232 c(2).

And for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Marshall P. Safir

MARSHALL P. SAFIR,
41 Flatbush Avenue,
Brooklyn, N. Y. 11027,
Tel. No. 858-2700.

Dated: September 13th, 1977.

Rita E. Pattarini

RITA E. PATTARINI
NOTARY PUBLIC, State of New York
No. 30-3032680
Qualified in Nassau County
Commission Expires March 30, 1979

Attachment I

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION CASH SUBSIDY PAYMENTS MADE TO SELECTED SHIPPING COMPANIES IN THE PERIOD MARCH 30, 1965 THROUGH FEBRUARY 28, 1966

<i>Name of Company</i>	<i>Operating- Differential Subsidies</i>	<i>Contruction- Differential Subsidies</i>	<i>Total Subsidies Paid</i>
American Export Isbrandtsen Lines, Inc.	\$ 29,044,028.74	\$ 344,685.73	\$ 29,388,714.47
American President Lines, Ltd.	25,281,292.09	14,764,741.49	40,046,033.58
Bloomfield Steamship Company	1,384,187.53	—0—	1,384,187.53
Farrell Lines Incorporated	6,428,221.13	—0—	6,428,221.13
Grace Line, Inc.	17,213,156.03	20,120,297.83	37,333,453.86
Lykes Bros. Steamship Co., Inc.	20,017,353.25	25,702,958.78	45,720,312.03
Moore-McCormack Lines, Inc.	21,236,087.68	1,616,758.09	22,852,845.77
Prudential Lines, Inc.	2,161,538.61	7,533,671.67	9,695,210.28
United States Lines, Inc.	26,844,437.62	7,992,953.06	34,837,390.63
Totals	\$149,610,302.68	\$78,076,066.65	\$227,686,369.33

207a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
MARSHALL P. BAPIR, ARNOLD
WEISSBOMER and SARPHIRE STEAM-
SHIP LINES, INC.,

Plaintiffs,

against

JAMES W. CUNYCK, Acting Maritime
Administrator, Maritime Adminis-
tration, United States Department
of Commerce, JAMES S. DAWSON, JR.,
Secretary, Maritime Subsidy
Board, Maritime Administration,
United States Department of Com-
merce, and C. R. SMITH, Secretary
of Commerce of the United States,

Defendants.
-----x

68C 643

CIVIL ACTION NO. 68-

COMPLAINT FOR REVIEW OF
AGENCY ACTION, INJUNCTION,
DECLARATORY AND OTHER
RELIEF

The above named plaintiffs, for their complaint
against the above named defendants, by their attorney ISAAC
B. KORNITZ, allege:

FIRST: This action seeks judicial review to compel
both agency action being unlawfully withheld and agency ac-
tion being unlawfully continued, as hereinafter appears.
The agency involved is the Secretary of the United States
Department of Commerce, the Acting Maritime Administrator,
Maritime Administration of the United States Department of
Commerce and the Secretary of the Maritime Subsidy Board,
Maritime Administration, United States Department of Com-
merce. This action arises and this Court has jurisdiction
by virtue of the following statutes: 46 U. S. C. 1227 (Mer-
chant Marine Act of 1920); 5 U. S. C. 702, 703, 704, 706

APP. C

(the agencies generally); 20 U. S. C. 2201, 2202 (Declaratory Judgment); 20 U. S. C. 1301 (Jurisdiction).

SECOND: Plaintiff Sapphire Steamship Lines, Inc. (an American Flag Carrier referred to as "Sapphire") is a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 41 Flatbush Avenue, Brooklyn, New York.

THIRD: Plaintiff Marshall P. Safir is a natural person residing at 8 Soundview Lane, Great Neck, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

FOURTH: Arnold Weissberger is a natural person residing at 1704 Bay Boulevard, Atlantic Beach, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

FIFTH: Defendant James W. Gulick is the Acting Maritime Administrator for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

SIXTH: Defendant James S. Dawson, Jr. is the Secretary of the Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

SEVENTH: Defendant C. R. Smith is the Secretary

of Commerce of the United States ("The Secretary").

EIGHTH: American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines Incorporated, Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Prudential Steamship Corporation, and United States Line Company are contracting American Flag common carriers which at all relevant times herein have received and are now receiving operating differential subsidies within the meaning of 46 U. S. C. 1227.

NINTH: Atlantic & Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO"), is a conference of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD") which has been approved under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814). Each of the common carriers listed in paragraph EIGHTH above was, during the relevant period herein, a member of AGAFBO.

TENTH: On May 6, 1965 the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) on its own motion instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), T-LINE (Trans-Pacific American-Flag

North Operators), WCAPO (West Coast American-Flag North Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

ELEVENTH: On December 12, 1967 the Federal Maritime Commission filed its decision, Docket No. 65-13, in which it found and concluded as follows concerning the rates of the Atlantic and Gulf American-Flag North Operators (AGAFNO):

1. The rates of AGAFNO, prior to the entry of Sapphire into the trade, and the rates of WCAPO were not contrary to section 18(b)(5).

2. AGAFNO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFNO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

TWELFTH: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

THIRTEENTH: That at all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessels registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the members of AGAFBO who are not entitled to receive them. Subsidies are provided for by 46 U. S. C. 1171 through 1182 inclusive and 1191 through 1204 inclusive, and are referred to as operating differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U. S. C. 1151 through 1161.

FOURTEENTH: 46 U. S. C. 1227 provides as follows:

"SEC. 1227. AGREEMENTS WITH OTHER CARRIERS FORBIDDEN; WITHHOLDING SUBSIDIES. ACTIONS BY INJURED PERSONS FOR DAMAGES.

It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States

United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

FIFTEENTH: Upon information and belief, the members of AGAPEO have received subsidies of both kinds, totaling in excess of \$600 million and are continuing to receive subsidies in violation of the statute, 46 U. S. C. 1227.

SIXTEENTH: On December 21, 1967 the plaintiffs requested the defendants to desist from making further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAPEO.

SEVENTEENTH: Upon information and belief, that although the defendants stated they would take whatever action was deemed appropriate, no action whatever has been taken either to recover whatever subsidies had already been paid or to refrain from continuing to make further subsidy payments.

EIGHTEENTH: The action and lack of action of the Secretary of the United States Department of Commerce is implemented by defendants James W. Culick and James H.

Dawson, Jr. in their official capacities. These actions and implementations thereof are agency actions subject to judicial review and appropriate judicial declaration and relief.

WHEREFORE, plaintiffs demand judgment for the following relief:

A. A judicial declaration adjudicating that the taking of any subsidy payment of any kind out of the funds of the United States to the carriers who were members of AGAFEO during the time period covered by the decision of the Maritime Commission, Docket No. 65-11, is illegal in violation of 46 U. S. C. 1227;

B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;

C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made;

D. That plaintiffs have such other and further relief as may be just and appropriate, together with the costs and disbursements of the action.

William F. Murray
WILLIAM F. MURRAY
Attorney for Plaintiffs
600 N. 1 P. O. ADDRESS
NEW YORK, N. Y.
NEW YORK, NEW YORK 10019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

MARSHALL P. SAFIR, ET AL.,	:	68 Civ. 643 (JFD)
Plaintiff,	:	
-against-	:	REPLY TO OPPO-
	:	SITION TO MOTION
	:	TO AMEND AND
ROBERT J. BLACKWELL, Assistant Secretary	:	CONSOLIDATE.
for Maritime Affairs, United States	:	
Department of Commerce, et al.	:	_____

-----X

UNITED STATES OF AMERICA, ex rel MARSHALL	:	77 Civ. 1093 (JFD)
P. SAFIR and MARSHALL P. SAFIR,	:	
Plaintiffs,	:	ANSWER IN
-against-	:	OPPOSITION TO
	:	MOTION FOR
	:	SUMMARY JUDGMENT.
AMERICAN EXPORT LINES, INC., ET AL.,	:	
Defendants.	:	_____

-----X

I.

It is clear that the Circuits are in conflict as to the date that the statute of limitations starts to run in false claims act cases. Defendants' memoranda of law cite all from U.S. vs Borin 209 F.2d 146, on one side of the spectrum to U.S. ex rel Vance vs Westinghouse 363 F.Supp. 1038 (WD Pa. 1973) and U.S. vs Klein 230 F.Supp. 426 (WD Pa.1964) aff'd 356 F.2d 983 (3rd Cir. 1966).

APP D

Plaintiffs submit that there is a third more meaningful date at which the statute starts to run. This date was established here in the Eastern District by Judge John Bartels in U.S. vs Silver 384 F.Supp.617(EDNY 1974) aff'd 515 F.2d 505 (2nd Cir. 1975), and where the Hon. David Trager, the U.S. Attorney appearing in this action was the successful advocate in that earlier action. In that case, the false claim arose at the point beyond the date the voucher was submitted and beyond the date the government's check was sent out by the disbursing officer-- the false claim arose after the checks were deposited in commercial banks and were thereafter caused to be presented and honored by the United States Treasury.

It is of little consequence in the civil action under recent interpretation of false claims act violations whether the claim has its roots in forgery as in U.S. vs Silver supra, or being false, fictitious or fraudulent as in U.S. vs Eagle Beef Cloth Company 1964 D.C.N.Y. 235 F. Supp. 491, or merely by getting benefits to which a claimant is not entitled as in U.S. vs Toepleman (1956, DC NC) 141 F. Supp.677 aff'd in part and rev'd in part on other grounds 356 US 595, 2L Ed 2d 1001, 78 S Ct 950. The date of the presentation of the government check to the

Treasury is the date of the final claim, and the statute tolls from that date U.S. vs Silver supra. also Scolnick v U.S. (331-F2D 598)

The non-trade defendants, in their motion for summary judgment herein, depend on the date that they allege they submitted the vouchers as governing when the statute begins to run. The trade lines, however, do not have even this slim reed to rest on. As will be seen, the date that 77C-1093 was filed, offers no escape hatch under any interpretation for them. The lack of any statute of limitations defense would, therefore, preclude summary judgment on this issue. Plaintiff submits that the Second Circuit's affirmation of U.S. vs Silver supra should indicate the Court's propensity for either its own approach as in "Silver" or the First Circuit, as in Scolnick v US supra. or the Third Circuit's as in "Klein" or "Westinghouse".

II.

In U.S. vs Toepelman supra, the Court observed that the government's case is made by showing that a false claim had been knowingly filed and that it is unnecessary to show an intent to defraud. This view is in opposition to the contentions held by all defendants in citing Woodbury vs United States. Plaintiff submits that recent FCA interpretation falls weightily on the side of the requirement that the claim only be knowingly false, fictitious, or fraudulent. This point of view has been

held in U.S. vs Fox Lake State Bank (1968 DC Ill. 240 Supp.720 rev'd on other grounds (CA 7 Ill. 366 F.2d 962)), where proof of "knowledge" was necessary and intent to defraud was not. Further, in U.S. vs Cooperative Grain and Supply Company 476 F2d. 4, "knowing" is further clarified in civil actions involving misrepresentation. This layman submits that the interpretation of specific intent to defraud in regard to the FCA as annotated in 26 ALR Fed. p. 307 et seq. has tilted in his direction.

The issue of "knowing" arises in an ironic sense in the opposition to plaintiff's motion to amend, 68(c)643 of the non-trade line. The plaintiff is pilloried for not taking cognizance of his jurisdictional infirmity that in docket 68(c)643 all his information was in the hands of the United States as far back as 1965 and all the facts which establish his common carrier status citizenship, etc. were common knowledge.

Counsel states that all the material necessary for finding of a violation of section 810 existed in 1965. By inference, he implies that all of the adversary hearings wherein he and other defendants denied the common carrier status of Sapphire and questioned even the citizenship of the parties and which had a six-year history from the inception of the action until the final determination by the

Secretary of Commerce of the violation was an unnecessary exercise because all parties knew in advance that a violation had occurred. Where it serves their purpose, these defendants are now in a position to defend the common carrier status of Sapphire at all costs because where it did not help them earlier, it helps them now. By so doing, it seems not to occur to them that by his client's "knowing" that section 810 was violated as early as 1965, he damns them at the threshold.

The defendants submit that if all the information is in the hands of the government at the time the relator files his action, the Court has no jurisdiction. The defendants have overlooked the basic fact that only the United States has the knowledge to determine whether all the evidence offered was in its possession at any given time in this twelve-year history and the government is silent on that issue in this case. Contrast the position the government took in *U.S. ex rel Greenberg vs Bermah Oil Ltd. supra*, where on the basis of a few documents the case was vigorously opposed by the Department of Justice on exactly these grounds. Why did the government offer no opposition in this action? The United States could have opposed here, but elected not to. Even now, in its belated

opposition to the amended complaint, the United States still refuses to oblige the defendants by taking the position that all the information was in its hands in 77C1093. The waiver in 77C1093, combined with the continued silence of the government on the issue of the prior possession of the evidence is the negation of their argument on this subject.

Certainly, the United States did not have all the facts in its possession to make such a determination until this plaintiff supplied the additional documentation and the additional sworn testimony in S243.

Furthermore, this Court in 68(c)643 on December 10, 1969 after the decision in Safir I did not perceive that a violation of section 15 of the Snipping Act was, in the Sapphire instance, a violation of section 810, (see exhibit 1), when the plaintiff pleaded that cause.

The earliest confirmation that plaintiff's information was meaningful and substantive was when the Second Circuit recognized that the doctrine of collateral estoppel would apply with some further development of the evidence--some of which could be gleaned from government files and some of which could be furnished by the moving party, the plaintiff herein. The development of the entire investigation was attributable to the plaintiff and the violation was confirmed after the investigatory process

in S243 was undertaken as a result of the Second Circuit decision in Safir I, at the behest of this plaintiff.

It will best be recalled that the title of S243 was "investigation of alleged violation of section 810 Merchant Marine Act 1936--the "allegations" by the government's own terminology were not finally proven until the Secretary's action in 1974 (see exhibit 2 Title page of recommended decision by Paul N. Pfeiffer, Esq.).

The defendants here emphasize the case of U.S. vs Aster, 176 F.Supp.208 (E.D.Pa. 1959) aff'd 275 F.2d 281 3rd Cir. 1959 as a jurisdictional bar to the action in 77C1093. Plaintiff here submits a quote from the decision in U.S. ex rel. Ronald Davis, plaintiff vs Long's Drugs Inc., 411 F.Supp. 1144 (S.D.Cal. 1976), as follows:

"Defendants emphasize here the case of United States vs Aster, 176 F.Supp.208 (E.D.Pa. 1959) aff'd 275 F.2d 281 (3rd Cir.1959),...in arguing that section 232(C) was designed to reach more than just those cases where plaintiff pirated his information from government sources. This court has serious reservations though as to the validity of the Aster decision in light of the above legislative history which indicates that Congress intended to eliminate only parasitical suits and the recent opinion of the Supreme Court in United States vs Neifert-White, 390 U.S.228,88S.Ct.959, 19 L.Ed2d 1061 (1968). It would not appear consistent with the Congressional purpose to bar false claim actions brought on behalf of the government when the relator possesses original information which he

which he has voluntarily turned over to the United States prior to commencing suit and the government declines to act to protect the public treasury. (Emphasis Added)

In Contrast with the policy of section 232(C) to limit suits not based on original information, the policy underlying the principal section of the False Claims Act, section 231, is to protect the United States Treasury from all manner of fraudulent claims. The Supreme Court has recently held that the False Claims Act is to be liberally construed to further the policy of compensating the United States for fraudulent claims. The Supreme Court in *United States vs Neifert-White*, 390 U.S.228, 88 S.Ct.959, 19 L.Ed.2d 1061 (1968) examined the legislative history of the Act and stated:

Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. In its present form the Act is broadly phrased to reach any person who makes or causes to be made 'any claim upon or against' the United States ...In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil. See, e.g. United States ex rel. Marcus v. Hess, 317 U.S.537, 63 S.Ct. 379, 87 L.Ed.443 (1943), (emphasis added). 390 U.S. at 232, 88 S.Ct. at 962."

(U.S. ex rel. Ronald Davis, Plaintiff, supra, at 1152.)

The action in 77C1093 can not in any way be described as a parasitical suit even without the new information that the Safir deposition discloses. The citation by the defendants of *U.S. ex rel. Greenberg vs. Burmah Oil Ltd.* 558 F.2d 43 (2d Cir. 1977), reads like a mockery of this plaintiff's ten-year battle (see attachment B in its entirety), even though it might meet the standard above.

When defendants compare the Second Circuit's rejection of an informer's embellishment of a New York Times article with a few documents on the fictional nature of the ownership of certain tankers under construction with mortgage guarantees by the Maritime administration, with the ten-year pursuit of justice and rehabilitation by this plaintiff in his desire to return to the business which these defendants drove him from in 1965 and 1966. The motion for summary judgment on this issue must fall.

III.

The government makes the point in its memorandum here, after not opposing the filing of the action in 77-1093 (in contrast to vigorous opposition in an appearance in U.S. ex rel. Greenberg vs. Burmah Oil supra)--Why did he wait five years more to actually file suit? The suit was not filed because under the procedure adopted by the Secretary of Commerce (and to which this plaintiff objected vigorously) in this layman's mind at that time that there was no basis for the filing until all the criteria for the finding of the violation had been met and all administrative appeals had been decided against the defendants. The delay in filing the FCA amendment here, or the filing of the FCA suit in 77C-1093 was directly attributable to the delay in the administrative exhaustion process from the Administrative Law Judge through the deliberations of the

Secretary of Commerce. The former Secretary Dent, whose potential abuse of discretion is a subject of the United States Court of Appeals decision in the DC Circuit on February 11th, 1977 (see attachment B, p. 15a, 17a) confirmed the violation of section 810 exactly six years and three months after this action was filed in 1968. Whether the abuse of discretion in regard to recovery of less than all subsidies paid was in any way planned to foreclose an FCA action by exceeding the six-year requirement is not known at this time--perhaps it will be made clear after investigation and discovery in 77C1093. Were it not for this Court's grant of injunctive relief in 1971, the only alternative door to a false claims recovery, if an amended complaint would not lie, would have been foreclosed.

The government, in its memorandum in opposition to amending the complaint, in 68C643 and in its anomalous position in regard to 77C1093 raises the question that plaintiff's delay in filing the amended complaint was related to the infirmity under the statute of limitations in his action 77C1093. This is not true. The statute of limitations was a bar to recovery of construction differential subsidy in 77C1093, since more than six years had elapsed in regard to claims for that form of subsidy. Also, the

element of on-going fraud which exists in 77C1093, as elicited in the deposition of this plaintiff of September 28, 1977, is not required to be raised in the amended complaint in 68C643, if the motion to amend is granted. In fact fraudulent conduct by the defendants may have prevented the plaintiff from being diligent in pressing his claim earlier (cf. Holmberg vs Armbrecht, 377 U.S.396).

Since the defendants here urge laches, claiming plaintiff delayed the commencement of the suit in 77C1093 and amending the complaint in 68C643, this defense must be examined here. Plaintiff calls the Court's attention to the transcript of 68C643 on May 31st, 1972, wherein counsel for the carrier-defendants attempted to confuse and mislead this pro se plaintiff by stating that a false claims case would not lie (see exhibit 4, p. 17 through 32,), and argued that this plaintiff had no Qui Tam interest in any recovery of subsidy funds. It is the contention of the plaintiff that he was misled at that hearing. In the case of Glus vs Brooklyn Eastern District Terminal 359 U.S.231, the Supreme Court held that defendants were estopped from raising the limitation because they had induced the delay. As stated in Glus, "No man may take advantage of his own wrong."

This Court's memorandum decision of December 10, 1972,

in denying injunctive relief on the ship's sale issue, posed the Qui Tam issue negatively and invited clarification by the Second Circuit (see exhibit 4). The Appellate Court, however, did not see fit to rule on the question and left the plaintiff's Qui Tam position unclear¹ (see exhibit 3), and the plaintiff was in the dilemma of being forced to wait for a final decision by the Secretary of Commerce on the violation before a false claim suit would be viable. It is of more than passing significance that the motion before the Court on May 31st, 1972 was in connection with this plaintiff's attempt to enjoin the proceeds of the sale of the SS United States, the SS Brazil, the SS Argentina and the SS Constitution from being turned over to the owners pending the administrative decision on whether section 810 had been violated. It has recently been reported in the New York Times and other papers nationally that James Barker, President of Moore-McCormack Lines who was Mr. Salzman's client at that time, has admitted to paying funds illegally to Edward Garmatz, the former Chairman of the House Merchant Marine Committee for arranging the

¹ Trade defendants state in their memorandum of law, p.20: "Never during any of these proceedings did Safir file any pleading whatever attempting to rely on the FCA, or any alleged 'knowing' or 'willful' filing of false vouchers. Exhibit 3 is dispositive of this claim.

enabling legislation herein. Mr. Garmatz is now under indictment for this act. In light of the Safir deposition, it is also noteworthy that rebating and payments to elected officials of the United States government are not uncommon but indeed are endemic to this industry (see attachment B, appendix Y, pp. 250-A to 256-A, letter from Congressman Paul N. McCloskey, Jr.).

When the U.S. Attorney now raises the cry "Why did he wait five years more to actually file suit?", he compounds not only his apathy, but at this late date after a waiver in favor of this plaintiff in 77C1093, he attempts to prejudice the case of the United States by lending his voice to the defendants' position. In 1972, the defendants, the government and, unhappily the Second Circuit, blurred the Qui Tam right and remedy. At this juncture, plaintiff respectfully submits "The policy of repose expressed in statutes of limitation is frequently outweighed where the interest of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights, but rather has been prevented from asserting them."

Burnett vs NY Central Railroad Company, 380 US424.

Contrary to defendants' contentions, the governing legal interpretation of the false claims act is the case of US ex rel. Marcus vs Hess supra, as opposed to US ex rel. Brenshiller vs Bauch and Lomb, 131 F.2d 545 (2d Cir. 1942).

"When Congress leaves to the Federal Courts the formulation of remedial details, it can hardly expect them to break with historical principles of equity in the enforcement of federally created equitable rights." (IBID)

"If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." (IBID p.396)

"And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar

The courts, as stated earlier, have held the statute to be a civil sanction and, therefore, remedial (see U.S. vs Templeton *infra*. 199 U.S. at 182). Since the defendants urge laches, the case of Holmberg vs Armbrecht, 327 U.S. 392 is directly on point under the circumstances of the instant actions: "Apart from penal enactments, Congress has usually left the limitations of time for commencing actions under national legislation to judicial implications." (Holmberg at 395).

"The present case concerns not only a federally-created right, but a federal right for which the sole remedy is in equity."(IBID)

reveals on-going fraudulent conduct by the defendants during the ensuing years.

IV.

In the circumstances and travail that this plaintiff has endured till now, it is indeed fortunate that the right to implement Rule 15(c) whenever the Secretary decided that an 810 violation had occurred/^{was cognizable} J.S. vs Templeton 199 F.Supp.179 had been decided in 1961 and is the convincing text on this rule as it applies to 31 USC 231-232-235.

Contrary to the brief of the U.S. Attorney, the amended complaint has a complete identity with the wrong suffered and the conduct causing such wrong. "The rule to be followed in Federal Courts is that if there is an

of the statute does not begin to run until the fraud
is discovered, though there be no special circumstances
or efforts on the part of the party committing the
fraud to conceal it from the knowledge of the other party."
(IBID p. 397)

Defendants arguments citing Woodbury vs U.S.232
F.Supp.49 would fall on the last underlined passage above,
since the fraudulent conduct could not truly have been
discovered until decision on the violation became final
September 1974, and the government's citation of U.S. vs
Borin supra as rejecting "Holmberg" would no longer hold
if further discovery as a result of the Safir deposition

identity between the amendment and the original complaint with regard to the general wrong suffered, and with regard to the general conduct causing such wrong, then the amendment shall relate back and the statute of limitations would not avail to preclude a hearing on the merits."

The opinion of Judge Wilson in "Templeton" reads as a complete rebuttal to all arguments made by defendants and governments against "relating back". The relief under the amended complaint in U.S. ex rel Safir vs American Export et al. is the same as the relief under the original complaint, the time that the wrong took place is the same eleven-month period in 1965, 1966, and the illegality then complained of was based on the same deceitful conduct and misrepresentation--continuing as parties and conforming to an agreement which was unjustly discriminatory or unfair...without informing the government agency with whom the defendants had contractual obligations based on statute of their wrongdoing. The position of the parties here parallels exactly the second count in the amended complaint in Templeton and as the Court held, "In essence the second count of the amendment seeks only an amplification of the damages claimed to have arisen out of the transaction complained of in the original pleading." "The general rule in this regard is that the amendment increasing the amount of damages claimed or merely varying the prayer for relief

does not state a new cause of action and may be allowed after the statute of limitations has run. (34 Am. Jur. Limitation of Actions, sec. 265.)"

Defendants and the government also misread the holding in Foman vs Davis, 371 U.S.178, since the Supreme Court ordered the lower court to allow amendments of the complaint because it appeared from the record that the amendment would have done no more than state an alternate theory of recovery. "Federal Rule 15(a) declares that leave to amend shall be freely given when justice so requires and denial of the motion without any apparent justifying reason was an abuse of discretion."

V.

Counsel for non-trade lines submits that a judgment was rendered in 1970 which was final. This position was rejected by this Court when it dismissed the motion of the U.S. Attorney demanding dismissal of the docket in return for plaintiff's recovery of his five thousand dollar security deposit in 1975. Both the opinions of the Second Circuit in Safir I and Safir II by their very words anticipated a return of the case at some point to New York (see Attachment B, p.231a.) "For the present we ask only that the Maritime Administration gives clear indication etc." Safir I, 1969 (see Attachment B, p.178a.) "We share plaintiff's concern over the time Maritime Administration has taken to decide the matter, especially in light of the

narrowing of the issues, etc., Safir vs Gibson 1972.

The litigants have returned to this Court on many occasions since that time. At no time in the seven years since the original order was issued has defendant's counsel objected to plaintiff's failure to move to vacate the order under Rule 59(e) or Rule 60(b). After all these years, the argument without regard to its merits would be subject to the judgment that the defendant slept on its rights.

Finally, non-trade counsels' citing of Rosenberg vs Martin 478 F.2d 520, is inapposite for the same reason that the government's citation of diversity in U.S. vs. Templeton was misconceived. The first count of "Templeton" may be viewed in the same terms as "Rosenberg". The original complaint concerned 21 loans on 22 bales of cotton, the amended complaint is based on improper loans on 524 bales of cotton. Thus, the only identity between the first count and the original complaint is the extent to which the 22 bales were included in the 524 bales, and these 22 bales are the specific subject of the second count of the amendment.

When the defendant was placed on notice that he was charged with wrongful action relating to 22 bales of cotton, he could not be charged with being placed on notice that he might be called up eight years later to defend himself from claims of wrongful action relating to 502 other bales of cotton. And so, on the first count, the

test was adequacy of notice. The same logic was applied by Judge Friendly in "Rosenberg". Assault was never mentioned in the original complaint.

The test of the amendment in 68C643 is whether it arose out of the conduct set forth in the original pleading. It emphatically does. And plaintiff submits that the only "assault" is on the pocket books of the defendants in the amplification of damages. "The general rule in this regard is that an amendment increasing the amount of damages or merely varying the prayer for relief does not state a new cause of action and may be allowed after the statute of limitations has run."

VI.

The U.S. Attorney suggests disfavor at the thought of being a stakeholder, or a bill collector for others in his citations in reference to attachments and garnishee. The suggestion that the United States will be the stakeholder for Marshall Safir is absurd since the action calls for the recovery for the benefit of the United States Treasury, with only a statutory amount set aside for the "Private Attorney General".

Further, he erroneously assumes that the courts have said the last word on the limits to the discretion of the Secretary in this case. Plaintiff respectfully reminds him that the remand of DC DC Docket 74-1474 is now ripe. The

most remarkable statement, however, appears on page 6 of his memorandum, "Both courts have declared that the Secretary has discretion to mitigate subsidy recovery. It follows that a claim for more than that amount is not false." In short, one million one hundred thousand dollars are false claims, but the remaining two hundred twenty-five million dollars are not, by Secretarial Decree. While the plaintiff is grateful for the government's support as to the falseness of any of these claims, he rejects this package deal. Judge Wright has already stated, "The Secretary's failure ... gives little assurance that we have been presented with an order resulting from a reasoned decision making process." While it is true that the Secretary has no false claims act function, once this Court determines that the prayer for alternate relief here is sound, the Secretary's duties under prayers D, E and F of the United States ex rel. Safir will be ministerial.

WHEREFORE: Plaintiff prays that the motion of defendants for summary judgment as to 77C1093 be denied, and that plaintiff's motion for leave to amend 68C643 be granted, and that both actions be consolidated for all purposes.

Respectfully submitted

MARSHALL P. SAFIR,
41 Flathush Avenue,
Brooklyn, N.Y. 11217,
Tel. No. 858-2700 (212).

October 26th, 1977.

EXHIBIT 2

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(S E V E D)
(April 19)
(MARITIME ADMINISTRATION)
(MARITIME SUBSIDY RD)

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. S-243

SAPPHIRE STEAMSHIP LINES, INC. v. AGAFBO
Investigation of Alleged Section 810 Violation

In the matter of the Petition of Sapphire Steamship Lines, Inc., re
Alleged Violation by Atlantic and Gulf American Flag Berth
Operators (AGAFBO) of Section 810 of the Merchant Marine Act
of 1936, as amended.

RECOMMENDED DECISION

PAUL N. PFEIFFER
Chief Hearing Examiner
Representative, Maritime Subsidy Board

Served Upon:

Petitioners: Mr. Marshall P. Safir, 41 Flatbush Avenue,
Brooklyn, New York 11217, pro se and
representing Petitioners Arnold Weissberger
and Sapphire Steamship Lines, Inc.

Public Counsel: Michael J. McMorro, Esq., Maritime Administration,
Washington, D. C. 20235

Exceptions, if any, to this Recommended Decision, together with supporting
Briefs, must be filed with the Secretary, Maritime Subsidy Board, and
served upon all Counsel herein within twenty (20) days from the service
date shown above, Replies to these Exceptions being due twenty (20) days
thereafter.

APP D1

Respondents:

James N. Jacobi, Esq., Kurrus & Jacobi,
2000 K Street, N. W., Washington, D. C. 20006,
representing American Export Isbrandtsen Lines,
Inc.

Murray J. Belman, Esq., Daniel H. Margolis, Esq.,
Bergson, Borkland, Margolis & Adler, 21 Dupont
Circle, N. W., Washington, D. C. 20036, and
Robert T. Basseches, Esq., Shea & Gardner,
734 15th Street, N. W., Washington, D. C. 20006,
representing American President Lines, Ltd.,
Prudential-Grace Lines, Inc. and Prudential
Steamship Company, Inc.

Anthony J. McElaney, Jr., Esq., Verne W. Vance, Jr., Esq.,
Foley, Hoag & Eliot, 10 Post Office Square, Boston
Massachusetts 02109, representing Farrell Lines, Inc.

J. Franklin Fort, Esq., Richard Salzman, Esq.,
Kominers, Fort, Schlefer & Boyer, 1401 K St., N. W.,
Washington, D. C. 20005, representing Lykes Bros.
Steamship Co., Inc., and Moore-McCormack Lines, Inc.

Amy Scupi, Esq., Olga Boikess, Esq., Galland,
Kharasch, Calkins & Brown, 1054 31st St., N. W.,
Washington, D. C. 20007, representing Bloomfield
Steamship Co.

John Williams, Esq., Kirlin, Campbell & Keating,
120 Broadway, New York, N. Y. 10005, representing
United States Lines.

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EXHIBIT **B** 3

Affidavit of Marshall P. Safir and Brief

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

—against—

ROBERT J. BLACKWELL, Maritime Administrator, Maritime
Administration, U. S. Department of Commerce, et al.,*Appellees.*

State of New York)

County of Kings) ss:

MARSHALL P. SAFIR, being duly sworn, deposes and says:

It has been more than two years since this court's last decision in *Safir v. Gibson* (432 F.2d 137 (2d Cir. 1970) with supplement June 18, 1970, was a sequel to (417 F.2d 972 (Cir. 1969.))

Both of these decisions set the course for the investigation and fact finding to follow through the administrative procedures of government prior to further judicial review by this court. This hearing is known as Docket No. S-243 before the Maritime Subsidy Board of the Department of Commerce.

APPENDIX
The Maritime Subsidy Board through its chief hearing examiner has finally rendered an initial decision dated April 24, 1972 in which the examiner affirms the common carrier status of Sapphire Steamship Lines during the

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EXHIBIT 3*Affidavit of Marshall P. Safir and Brief*

period in question and thereby validates the last remaining criterion for a violation of section 810 of the Merchant Marine Act 1936 as defined by this court.

This appellant has been actively concerned that the public officials who were originally unwilling to take any action on this claim that subsidies be recovered, were not taking proper safeguards to protect the interest of the United States and his own in later action under 31 U.S.C. Sec. 231, 232, 233 & 235 after extent of these recoveries are decided upon.

As a close observer of the financial condition of American Flag Shiplines over many year, appellant has knowledge of the present precarious financial condition of some of these violators—specifically American Export Lines, United States Lines and Prudential Grace Lines, even if his instant claim did not exist. Moore McCormack postulates to financial soundness but would not be sufficiently credit-worthy for the subsidy refund potentially due here at double damages without precautionary measures being taken by a prospective judgment creditor.

Accordingly, in June 1971 this appellant moved for an order before Judge Dooling which was granted on June 22, 1971 and later amended July 26, 1971 herein Exh. 7. It is interesting to note that Judge Dooling was persuaded to issue it when it became apparent that payments of these old claims were being expedited by the Maritime administration before its duty to this appellant under *Safir v. Gibson*, supra, p. 3511 Exh. 8 to decide whether to recover subsidies. By the time this injunction issued, almost \$36,000,000.00 of the total of \$36,849,478.06 had been paid out to the violators for claims which have now been proven fraudulent.

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EXHIBIT ~~4~~ 5*Affidavit of Marshall P. Safir and Brief*

Although Judge Dooling's order was narrow in respect that only those funds which applied to the eleven month period were subject to it, the decision was significant. It served to confirm that on prima facie evidence of violation alone, injunctive relief was available prior to judgment in certain circumstances. While this appellant might not be entitled to infer that "every other asset and every other pending receipt of any of the Steamship Co.'s would with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the subsidy board" (see Pg. 5, Exh. 9) at *that* time;—after the initial decision of the chief hearing examiner (Ex. 1) effectively finding that the last remaining criteria for the establishment of sec. 810 violation had been met. *Safir v. Gibson*, supra 1970, Ex. 10). This appellant was *now* entitled to protect his interest against continuing slack enforcement of the statute 46 U.S.C. 1227 sec. 810. (See Exh. 11 N.Y. Times August 8, 1972.)

On information that various passenger ships owned by the violators and built with 50% construction differential subsidy funds were authorized for sale to foreign interests by the congress (see Exh. 12) and that the s.s. United States would be sold to the government with unlimited use of the net proceeds thereof for 12 months, and in light of statements by financial officers of the violating carriers to their potential insolvency, (see exh. 13) appellant sought injunctive relief by a government escrow of the net proceeds of these sales pending determination of the amount of subsidy refund due.

The amount of subsidy refund potentially recoverable for the period in question at single damages may approximate \$500,000,000.00. At present \$1,000,000.00 is being

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EXHIBIT 3

Affidavit of Marshall P. Safir and Brief

withheld against this liability while the Maritime Subsidy Board continues its procrastination (see exh. 6 & 6A), with the same zeal that it expedited the payment of almost \$80 million false past subsidy claims in total last year (see pg. 2, exh. L4.)

Judge Dooling, upon evidence no longer *prima facie*, but on a hard finding of fact, finds no cause for alarm and feels himself comfortable under a coverlet of outdated balance sheets; hence this appeal.

STATEMENTS OF ISSUES

There are two issues presented for review to this court:

(1) Does appellant Marshall P. Safir have a statutory interest under 31 U.S.C. Sec. 231-233, 235 in any forfeiture mandated by the violation of 46 U.S.C. 1227 Sec. 810 by the offending ocean carriers as Sec. 819 has been interpreted by *this court's* decisions in *Safir v. Gibson, supra*, 1969 and *this court's* decision and supplementary denial of respondents motion for hearing *en banc supra* 1970.

(2) Does the finding of fact by the chief hearing examiner that *this court's* last remaining criteria for a violation of Sec. 810 has been met finally give their appellant the right to demand that ship and other asset sales by the violators be placed in escrow or otherwise set aside for execution pending review by *this court* of the government's decision whether to recover subsidies due and if so how much and from whom.

Appellant believes Judge Dooling to be in error when he stated in his order that no statute authorizing a *qui tam* recovery had been pointed to. On page 27 line 22 of the transcript May 31, 1972, the False Claims Act was pointed

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EXHIBIT ~~4~~ 3*Affidavit of Marshall P. Safir and Brief*

to specifically by Mr. Salzman. At the same time Mr. Salzman was kind enough to mention the landmark decision regarding *qui tam* actions *United States ex rel Marcus v. Hess* (317 U.S. at 537-561), even though Judge Dooling is technically correct in that appellant did not cite 31 U.S.C. 231-233, 235 as representing the newer statutory listing updated with supplements.

It is most helpful to a citizen acting pro se to find so topical a reference as *Connecticut Action Now Inc. v. Roberts Plating Co., Inc.* in which this court has now carefully circumscribed the qualifications for standing to sue for civil penalties under 31 U.S.C. 232. The classic definition of standing to pursue a violation of Sec. 819 as defined in *Safir v. Gibson* 1970 *supra* p. 1701 is fully matched and met by this appellant in outline and contour in regard to standing under 21 U.S.C. 231-233, 235. The best evidence of the classic *qui tam* nature of this appellant's quest is summed up on p. 20 of exh. 4 wherein the Public Counsel Michael J. McMorro, consistently backing his proposed findings and brief (exh. 15 & 15A) states, "in the present case, and notwithstanding the inclusion of the requirements of Sec. 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. *once the board was involved, and only through the behest of Mr. Safir*, the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of *the day they first began, without any overture to the Maritime Administration, the unlawful behaviour.*"

The deceit is obvious. The respondents unlawful behaviour during that period violated both a clear provision

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EXHIBIT ~~4~~ 3*Affidavit of Marshall P. Safir and Brief*

in the subsidy agreement as well as an explicit statute and in presenting their claims for subsidy payments corresponding to that period the respondents received government monies to which they were not entitled. Moreover, in presenting the claims, the respondents were holding out that the provision of Sec. 810 which are incorporated in the subsidy agreement had been complied with, in effect misrepresenting their compliance with its terms. Appellant in fact far exceeds the requirements of the doctrine in *Marcus* and fortuitously escapes every disqualification inherent in the infirmity of the environmental group bringing the action in *Roberts Plating, supra* to justify his *qui tam* interest.

Beyond the affirmative configuration of standing in *Marcus* and meeting the limitations imposed in *Roberts* is the fact that *this appellant is just as much a victim of false claims as the Government with which he seeks to share the potential recovery.*

The subsidy claims paid to the respondents were used to finance their very predatory activities against this appellant's company. As stated by this Court on p. 3508 in *Safir v. Gibson, 1969*,

"The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable by-product. The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim.

"We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the admin-

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EXHIBIT 3

Affidavit of Marshall P. Safir and Brief

istrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. *Recovery of such payments imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him.*"

Moreover, despite notice to the proper governmental agencies (Maritime Administration, and by them the Dept. of Justice), it is only through the single handed efforts of this appellant that the Government has the opportunity to recover the monies which the respondents wrongfully procured from the public fisc. As stated in *United States v. Griswold*, 24 F. 366:

"Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow going public vessel."

This Court, through a footnote #8 in *Safir v. Gibson*, 1969, *supra* stated "the grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precluded the availability of further relief consistent with the statutory scheme." It is indeed reassuring to this appellant to know the broad legal base on which he stands. However, the availability of the specific authorization afforded by 31 U.S.C. 232 should be enough by itself for his re-entry into the Maritime Industry consistent with the statutory scheme.

The appellant is prepared to invest his share of the recovery back into the American Merchant Marine in order that such recovery might not "fatally interfere with the general policy of the act to foster the development of the

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EXHIBIT *Affidavit of Marshall P. Safir and Brief*

American Merchant Marine." (*Safir v. Gibson, supra*, pp. 3506-7 & 9.)

Appellant does *not* intend to "take the money and run."

WHEREFORE, appellant prays that this Court reverse the instant order by directing that the injunction issue and instruct all concerned that this appellant does have a *qui tam* interest as set forth in 31 U.S.C. 231, 232, 233, 235 in any recovery mandated for the violation of 46 U.S.C. 1227, Sec. 810, and for such other relief as this Court may direct.

Respectfully submitted,

s/s MARSHALL P. SAFIR

MARSHALL P. SAFIR

Pro Se

August 21, 1972

State of New York
County of Kings

ROBERT J. DANNENHOFFER
Notary Public, State of New York
No. 52-5916586
Qualified in Suffolk County
Commission Expires March 30, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—September Term, 1972.

(Argued November 27, 1972 Decided November 29, 1972.)

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

v.

ROBERT J. BLACKWELL, Maritime Administrator, Maritime
Administration, U.S. Department of Commerce, et al.,
MOORE-McCORMACK LINES, INC., UNITED STATES LINES,
INC., AMERICAN EXPORT LINES, INC., and PRUDENTIAL-
GRACE LINES, INC.,

Appellees.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the East-
ern District of New York, John F. Dooling, Jr., *Judge,*
denying plaintiff's motion for an order requiring the pay-
ment into escrow of sums expected to be received by the
ship operator defendants on the sale of certain ships.

Affirmed.

MARSHALL P. SAFIR, *Appellant Pro-Se.*

GILBERT S. FLEISCHER, Esq., New York, N.Y.,
Attorney in Charge, New York Office, Ad-

675 P. 1.

APP. D3,

miralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Esq., Assistant Attorney General, Robert A. Morse, Esq., United States Attorney, of Counsel), *for Appellees Robert J. Blackwell, Maritime Administrator, et al.*

RICHARD S. SALZMAN, Esq., Washington, D.C. (J. Franklin Fort, Esq., Kominers, Fort, Schlefer & Boyer, Washington, D.C., of Counsel), *for Appellee Moore-McCormack Lines, Inc.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, New York, N.Y., of Counsel), *for Appellee United States Lines, Inc.*

JAMES N. JACOBI, Esq., Washington, D.C. (Kurus and Jacobi, Washington, D.C., of Counsel), *for Appellee American Export Lines, Inc.*

MICHAEL O. FINKELSTEIN, Esq., New York, N.Y. (Barrett, Knapp, Smith, Schapiro & Simon, New York, N.Y., Daniel H. Margolis, Esq., and Bergson, Borkland, Margolis & Adler, Washington, D.C., of Counsel), *for Appellee Prudential-Grace Lines, Inc.*

PER CURIAM:

In this case, which is now here for the third time, see *Safir v. Gibson*, 417 F.2d 972 (2 Cir. 1969); *Safir v. Gibson*, 432 F.2d 137 (2 Cir.), *cert. denied*, 400 U.S. 850 (1970), plaintiff *Safir* moved to require the ship operator defendants to pay into escrow moneys expected to become pay-

able to them in consequence of the sale of certain American flag ships authorized by Public Law 92-296, which became effective May 17, 1972. The motion was based on plaintiff's fear that the defendants might not be financially able to respond to a direction for the repayment of operating differential subsidies which may be made by the Maritime Administration Maritime Subsidy Board in the proceeding, Docket No. S. 243, instituted as a result of our first decision. The Assistant Secretary of the Board and of the Administration submitted an affidavit indicating that the Government entertained no doubt of its ability to recover, by set-off or otherwise, any amounts that might ultimately be found to be repayable. Accepting this conclusion, the district court denied the requested relief.

The judge's order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of three of the four ship operator defendants. We share plaintiff's concern over the time that the Maritime Administration has taken to decide this matter, (especially in light of the narrowing of the issues by our 1970 decision) However, we were advised at argument that, at long last, the matter has now been finally submitted, and we expect it to be promptly decided.

Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the decision and we have no occasion either to approve or to disapprove it.

Affirmed.

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Appendix ~~E~~ Opinion of the Court of Appeals on
Petition for Rehearing, Dated June 18, 1969 / C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.

(Decided June 18, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and
SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES
W. GULICK, Acting Maritime Administrator, Mari-
time Administration, United States Department of
Commerce, JAMES S. DAWSON, JR., Secretary, Mari-
time Subsidy Board, Maritime Administration, United
States Department of Commerce, and MAURICE STANS,
Successor to and Substituted for C. R. SMITH, Secre-
tary of Commerce of the United States,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD
STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY,
INC.; MOORE-McCORMACK LINES, INC.; UNITED
STATES LINES, INC.; AMERICAN PRESIDENT LINES,
LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRU-
DENTIAL GRACE LINES, INC.; and FARRELL LINES,
INC.,

Intervenors.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

1

APPENDIX

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*Appendix B—Opinion of the Court of Appeals on
Petition for Rehearing, Dated June 18, 1970¹*

PER CURIAM:

In our decision of February 26, 1970, — F.2d —, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n.4 (1969); — F.2d at —, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.¹

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see — F.2d at —, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of § 15 of the Shipping Act had expired and therefore could not longer be disapproved under § 18(b)(5). But § 15 subjects offending lines to a penalty of \$1000 per day of violation. Since

¹ We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

*Appendix B—Opinion of the Court of Appeals on
Petition for Rehearing, Dated June 18, 1969*

the FMC's determination would be conclusive in a civil action for penalties, it was therefore clearly appealable. See *Pacific Far East Line, Inc. v. FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying \$25,000 each. Moreover, while we relied mainly on this point, — F.2d at —, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under § 810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter *in limine*. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge implying that the FMC determination did *not* have binding effect. — F.2d at —, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided

~~201A~~

*Appendix E—Opinion of the Court of Appeals on
Petition for Rehearing, Dated June 18, 1970*

in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemingly for the Maritime Administration to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." — F.2d at —, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the Maritime Administration; we said nothing about who was responsible for these and, by a footnote 2, emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains *open*.

The intervenors' petitions for rehearing are denied.

Nov 26 2 30 PM '75

106

MARSHALL P. SAFIR,

Plaintiff,

-against-

ROBERT W. BLACKWELL, Assistant
Secretary of Commerce,
and
FREDERICK DENT, Secretary of
Commerce,

Defendants.

68 Civil 643 (JED)

AFFIDAVIT OF
DEFENDANTS IN
OPPOSITION TO
PLAINTIFF'S MOTION
FOR RELEASE OF
SECURITY DEPOSITS

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

GILBERT S. FLEISCHER, being duly sworn, deposes and
says:

1. I am an attorney in the Admiralty and Shipping
Section, New York Office, of the Department of Justice in
charge of the handling of this case on behalf of the
Government and am familiar with all of the proceedings here-
tofore had herein.

2. This affidavit is made in opposition to the
pending motion of Marshall P. Safir for release of security
deposits.

3. Although Mr. Safir would seem to make it appear
that this action is abandoned and he is entitled to return
of his deposit, it must be pointed out to the Court that
he has been actively engaged in another court pursuing the
same theory he urged to this Court (rejected in its Order
of April 30, 1974, copy annexed as Exhibit A), namely, that
the Secretary of Commerce has the mandatory duty to recover
full subsidy, and should be commanded to do so. This is
the subject of a suit Mr. Safir filed in the United States
District Court for the District of Columbia entitled

APP.F

①

Safir v. Dent, Civil Action No. 74-1474, wherein he sought to review the decision of the Secretary of Commerce in the proceeding entitled In the Matter of: Maritime Subsidy Board Docket No. S-243, Investigation of Alleged Violations of Section 810 of the Merchant Marine Act 1936, as amended.

On motions for summary judgment by both parties, the Court granted the Government's motion and dismissed the complaint (Exhibit B). On October 24, 1975, Mr. Safir filed an appeal therefrom with the Court of Appeals for the District of Columbia (Exhibit C).

4. In the District of Columbia action the Government stated in its papers that Safir was seeking to litigate the very questions he could or should have litigated in the instant case (E.D.N.Y.), and which in fact had already been disposed of by this Court in its order of April 30, 1974 (Exhibit A).

5. Therefore, as long as Mr. Safir continues to press for further recovery of subsidy payments either in this Court or in any other, it is within the Court's power to retain the security deposit required by the Federal Rules of Civil Procedure Rule 65.

6. As an alternative, if Mr. Safir proposes to dismiss this action in order to withdraw his deposit, or the Court, finding that Mr. Safir has already exhausted the relief sought in this action and deems it appropriate to dismiss the action and return the deposit, it should do so only with prejudice.

Wherefore, the Government respectfully prays that this Court deny plaintiff's motion for release of security

deposits or, in the alternative, dismiss this action with prejudice and thereafter return plaintiff's security deposit.

GILBERT S. FLEISCHER

Sworn to before me this
day of November, 1975

RECEIVED
MAY 01 1974

109.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
MARSHALL P. SAFIR, et al.,

Plaintiffs,

68 C 643

-against-

MEMORANDUM
and
ORDER

ROBERT J. BLACKWELL, Maritime
Administrator, Maritime
Administration, U.S. Department
of Commerce, et al.,

Defendants.
----- X

The situation of the parties and the disposition of events have not so changed as to require injunctive relief different from that earlier granted. Judge Robinson's decision of February 7, 1974, related to the basis on which operating differential subsidies may properly be granted, and not to the basis on which refunds could be exacted. The refund rule appears to measure out forfeitures equal to the part of each cost subsidy allocable to the cargo on which the offending rates were made.

It is, accordingly,

ORDERED that the motion made by the Affidavit and Motion for Modification of April 5, 1974, is in all respects

denied.
Brooklyn, New York
April 30, 1974.

[Handwritten Signature]
U. S. D. J.

ATTACHMENT I

EX. A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

110

MARSHALL P. SAFIR,

Plaintiff,

v.

FREDERICK DENT, individually
and as Secretary of Commerce,

Defendant,

AMERICAN PRESIDENT LINES, LTD.,
et al.,

Intervening Defendants.

Civil Action No. 74-1474

FILED

OCT 22 1975

JAMES F. DAVEY, Clerk

ORDER

Plaintiff Marshall P. Safir, having moved for summary judgment, defendant Frederick Dent, and intervening defendants Trade Lines and Non-Trade Lines having replied to plaintiff's motion and cross-moved for summary judgment, the Court having considered the motions, memoranda of points and authorities of all parties, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied, that defendant's and intervening defendants' motions for summary judgment are granted and the complaint herein is dismissed with prejudice this 21st day of October, 1975.

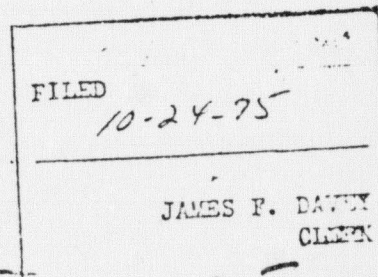
William B. Bryant
JUDGE
EX.B

United States District Court for the District of Columbia

III

Margaret Smith
Plaintiff.
vs.
Frederick Dant et al
Defendant.

CIVIL No. 74-1474



NOTICE OF APPEAL

Notice is hereby given this 24 day of October, 1975, that

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22 day of October, 1975 in favor of Frederick Dant et al against said on answer by

Margaret Smith
Attorney for
Pro Se

Allen van Emmerik Esq.
Administration & Shipping
Dept. of Justice 20530

EX.C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

112

MARSHALL P. SAFIR,

Plaintiff,

68 C 643

- against -

MEMORANDUM and
ORDER

ROBERT W. BLACKWELL, Asst. Secretary
of Commerce, and FREDERICK DENT,
Secretary of Commerce,

Defendants.

Plaintiff has moved for an order releasing the \$5000.00 security deposit made by plaintiff on June 22, 1971 under F.R.C.P. 65(c). Plaintiff at that time sought injunctive relief, which was granted by this Court on June 22, 1971, and modified on July 26, 1971 (both orders are attached to this order as an exhibit). The granting of the injunctive relief was conditioned on plaintiff's deposit of \$5000.00 with the clerk of the court as Rule 65(c) security. On October 4, 1974, in accordance with the terms of the injunction, this Court ordered that the injunction "is deemed satisfied and of no further effect."

The purpose of such a security is to allow "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." F.R.C.P. 65(c). There has been no

APP G

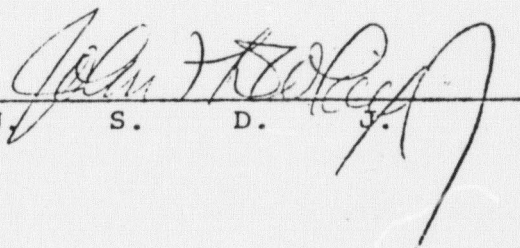
showing or even assertion by the defendants of such wrongful restraint, and since by its terms the injunction is no longer in effect, there appears to be no reason to require the maintenance of the security. However, to allow the defendants further opportunity to interpose their objections or an appeal, the release of the security will be delayed until December 15, 1975. Accordingly, it is,

ORDERED that plaintiff's motion to release his \$5000.00 security deposit made on June 22, 1971, is granted, to take effect December 15, 1975.

Brooklyn, New York,

December 2, 1975.

U. S. D. J.



114

Defendants.

68 CIV 643 (JFD

AFFIDAVIT

Defendants.

77 CIV 1093 (JFD)

STATE OF NEW YORK)
COUNTY OF NEW YORK)

22. :

GILBERT S. FLEISCHER hereby declares and verifies under penalty of perjury that the following is true and correct:

1. I am an attorney in the New York office, Admiralty and Shipping Section, United States Department of Justice. I am in charge of the above-captioned action (68 CIV 643) and am familiar with the facts and proceedings heretofore had herein.

2. This affidavit is submitted in opposition to plaintiff's Motion to Consolidate and Amend the complaint in 68 CIV 643.

3. The original complaint in Safir v. Blackwell, 63 CIV 643, was filed on or about June 24, 1968, against officers of the Maritime Administration of the United States and sought injunctive relief on the ground that a number of subsidized steamship companies, alleged to have violated Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. §1227, be enjoined

App. H

from receiving operating differential subsidies for the 115
period of violation.

4. Now more than nine years afterward Mr. Safir moves for leave to file an amended complaint to include a qui tam proceeding under the provisions of the False Claims Act, 31 U.S.C. §231 et. seq. as an added cause of action, despite the fact that this same cause of action has already been stated in a new action, 77 CIV 1093, filed in this court in May 1977.

5. Unquestionably the only reason for the motion to amend 68 CIV 643 to include the qui tam proceeding under the False Claims Act, 31 U.S.C. §231 et. seq. is to avoid the bar of the statute of limitations in the new action docketed as 77 CIV 1093 and filed in May 1977.

6. As we discuss more fully in our accompanying memorandum of law, there are numerous reasons why the amendment to the original complaint should not be allowed and the remedy, if there be any, must stand or fall in the action at law designated 77 CIV 1093.

7. The original complaint in 68 CIV 643 was brought principally against federal officers, and the intervention by the defendant carriers was to protect their interests in subsidy payments threatened by Mr. Safir's complaint. Thus, more properly the qui tam proceeding should be pressed in 77 CIV 1093 where the carriers are the only defendants. No such proceeding can be brought against federal officers, since under the provisions of the False Claims Act, the Government itself is given the option to prosecute the proceeding.

8. Under date of June 21, 1977, the United States filed a Declination of Appearance in 77 CIV 1093 (see copy annexed to memorandum of law) thus leaving Mr. Safir to prosecute as a "private Attorney General." No different action is

anticipated by the United States in the event the 68 CIV 643 action were allowed to be amended.

WHEREFORE, it is respectfully prayed that the motion of plaintiff Safir to consolidate the two captioned actions and amend the complaint in the action designated 68 CIV 643, be denied in all respects.

Executed on this

19th day of October 1977.

S/
GILBERT S. FLEISCHER

Yours, etc.

68C 643

MARSHALL P. SAFIR, ET AL vs. JAMES W. GULICK, Acting
Maritime Administrator, et al

FIDINGS-PROCEEDINGS

AMOUNT
REPORTED IN
EMOLUMENT
RETURNS

58	COMPLAINT FILED. SUMMONS ISSUED. June 24, 1968	1	855
11-68	Summons returned and filed. U.S. Atty General srvd on 6/24/68 by certified mail; U.S. Atty srvd on 6/24/68; R.C. Smith srvd 6/28/68; James W. Gulick and James S. Dawson srvd on 7/3/68.	2	
4-68	By JUDD, J.- Order filed extending time for defts to answer complaint to Sept 16, 1968. (1) (P/C mailed to attys) /MS	3	
7-68	Notice of motion and memorandum filed pursuant to Rule 12(b)(3) dismissing complaint etc. (ret Sept 25, 1968)	4/5	
2-68	Affidavit of Marshall P. Safir and plttfs' memorandum of law filed in opposition to defts' motion to dismiss etc.	6/7	
20-68	Statement of Material facts, Rule 9(g) filed.	8	
25-68	Affidavit of Gilbert S. Fleischer and defts' reply memorandum filed in opposition to plttfs' application to treat this motion as one for summary judgment.	9/10	
25-68	Statement of material facts filed pursuant to Rule 9(g).	11	
25-68	Before DOOLING, J.- Hearing on motion pursuant to Rule 12(b)(3) dismissing complaint etc. - Motion argued - Decision reserved.		
20-69	By DOOLING, J.- MEMORANDUM & ORDER FILED. Decision rendered on motion to dismiss etc. - it is Ordered that the motion to dismiss the complaint, etc. is granted and the remaining motions are not passed upon; and the Clerk is directed to enter judgment that plttfs take nothing and that the action is dismissed with costs as taxed by the Clerk. (See opinion & Order)	12	
-25-69	JUDGMENT FILED. It is ordered that plttf take nothing and that the action is dismissed with costs as taxed by the Clerk. (P/C mailed to attys) /MS	13	856
7-69	Bill of costs filed. Costs taxed in the sum of \$20.00.	14	
7-69	NOTICE OF APPEAL FILED. Copy of appeal mailed to LOUIS E. GRECO, Esq. Atty in Charge Adm. & Shipping. Section, etc. 26 Federal Plaza, Suite 4048, N.Y. 10007	15	
17-69	Record on appeal certified and mailed to Court of Appeals.		
-28-69	Receipt returned from Court of Appeals acknowledging record on appeal filed.	16	
-9-69	BOND ON APPEAL FILED.	17	
-14-69	Certified copy of Court Appeals judgment filed it is ordered that the order and judgment of said District Court are reversed and that the action is remanded to said District Court for further proceedings consistent with the opinion of this Court with costs	18	

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
11-14-69	Bill of costs filed. Costs taxed in the sum of \$328.90 in favor of the appellants. (annexed to Court of Appeals judgment) (J/C)			
11-25-69	ANSWER of defts filed. (affid of srv by mail on 11/25/69)		19	
11-28-69	Order to show cause with proof of service filed, for injunction etc. (ret Dec 5, 1969)		20	
12-4-69	Memo of Deft's in opposition to motion filed		21	
12-5-69	Before DOOLING, J. Case called. Hearing on order to show cause on injunction. Decision reserved.			
12-9-69	By DOOLING, J.- MEMORANDUM incorporating FINDINGS OF FACT and ORDER DENYING INJUNCTION filed. It is ORDERED that the motion for an injunction is in all respects denied. (See memo and order) (P/C mailed to attys)		22	55
12-11-69	NOTICE OF APPEAL FILED. (Copy of appeal mailed to Edward R. Neaher, U.S. Atty 225 Cadman Plaza East, Eclyn, NY		23	JCD
12-16-69	Record on appeal certified and mailed to Court of Appeals.			
12-19-69	Receipt returned from Court of Appeals acknowledging record on appeal, filed.		24	
1-5-70	Bill of costs filed. Costs taxed in the sum of \$15.00. (J/C		25	
4-15-70	Record on appeal rec'd from Court of Appeals receipt mailed out.			
8-5-70	Certified copy of Court of Appeals judgment filed. It is ordered that the order of said District Court is affirmed as modified without costs in accordance with the opinion of this Court. (see opinion)		26	
8-11-70	Affidavit of service of order on mandate filed.		27	
8-21-70	Stenographer's transcript filed.		28	
9-3-70	Letter to Judge Dooling from Isadore B. Hurwitz, Esq. with certificate of certificate of mailing, dated 9-3-70 with copy of letter from Supreme Court of U.S. attached filed.		29	
9-4-70	By DOOLING, J.- Proposed order filed. (P/C mailed to atty)		30	
9-14-70	By DOOLING, J.- Memorandum to counsel filed.		31	
9-15-70	Letter to Judge Dooling, from Isadore B. Hurwitz, Esq. dated 9-14-70 filed.		32	

68-C-643 MARSHAL P. SAFIR, ET AL VS JAMES W. GULICK etc.

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT PAID BY PLAINTIFF
		PLAINTIFF	DEFENDANT	
9-17-70	By DOOLING, J.- Order on mandate filed instructing Maritime Administration to proceed without delay etc. (P/C mailed to attys)			33
9-17-70	By DOOLING, J.- Memo to Counsel filed.			34
9-24-70	NOTICE OF APPEAL FILED. (copy of appeal mailed to Arnold & Porter, Esqs. 1229 19th St. N.W. Washington, D.C. Barrett, Knapp, Smith & Shapiro, Esqs. 26 Bway, N.Y. Kurrus & Jacobi, Esqs. 200 K St., N.W., Washington D.C. Galland, Kharasch, Calkins & Brown, Esqs. 1054 31st St. N.W. Washington, D.C. 20005; Foley, Hoag & Eliot, Esqs. 10 Post Office Square, Boston, Mass. 20190; Bergson, Borkland, Margolis & Adler, Esqs. 888 17th St. N.W. Washington, D.C. Kominers, Fort, Schlefer, Farmer & Boyer, Esqs. 529 Tower Bldg. Washington, D.C. Dils & Skelker, Esqs. 501 - 5th Ave. N.Y. Kirlin, Campbell & Kearing, Esqs., 120 Bway, N.Y.; Louis E. Greco, Esqs. 26 Federal Plaza, N.Y.)			35
10-3-70	Copy of appeal, sent to Kurrus & Jacobi, Esqs. 200 K. St. N.W. Washington, D.C. on 9-24-70, (returned moved no forwarding address) filed.			36
6-11-71	Order to show cause with proof of service filed, for preliminary interlocutory injunction etc. (ret June 15, 1971)			37
6/22/71	Before Dooling, J.-Case Called for hearing on motion for preliminary injunction-Motion argued-Decision reserved			
6/23/71	By Dooling, J.-Memo of Findings of facts & Order dtd 6/22/71 denying plttf's motion for injunction, etc. filed.			38
6/24/71	\$5,000.00 deposited in Registry of Court.			
7-8-71	Stenographer's transcript filed.			39
7-22-71	Affidavit of Isadore B. Hurwitz of service of notice of resettlement etc. filed.			40
7-26-71	By DOOLING, J.- Order filed that the first ordering paragraph of the order of this Court, dated 6/22/71 is amended etc. (P/C mailed to attys)			41
7-26-71	By DOOLING, J.- MEMORANDUM FILED, re increase in the security etc. (See memorandum endorsed on back of order) (paper #41)			===
5/17/72	Before Dooling, J.-Case called for hearing on motion to amend order to show cause for inj. signed 5/4/72-motion for prel. inj. argued & granted-motion for t.r.o. denied			
-----cont'd-----				

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
5/17/72	By Dooling, J.-Order to show cause dtd 5/4/72 for prel. inj., with proof of service filed, ret.			
	5/31/72 at 4:30 PM			42
5/17/72	By Dooling, J.-Order to show cause for prel. inj. ret 5/31/72 at 4:30 PM filed.			43
5/17/72	Notice of appeal filed. (Copy of notice of appeal mailed to C of A)			44
5-22-72	Stenographer's transcript dated 5-17-72 re: hearing on motion to amend order to show cause for injunctive relief, FILED.			45
5-23-72	Deft Moore-McCormack Lines, opposition to plttf's motion for a preliminary injunction filed.			46
5-26-72	Memorandum of U.S.A. filed on behalf of deft Andrew Gibson et al			47
5-26-72	Deft Prudential-Grace Lines' opposition to plttf's motion for a preliminary injunction filed.			48
5-27-72	Deft American Export's opposition to plttf's motion for a preliminary injunction filed.			49
5-31-72	Opposition of deft U.S. Lines, to plttf's motion for a preliminary injunction.			50
5-31-72	Before DOOLING, J.- Hearing on plttf's show cause for a preliminary injunction etc. - Motion argued - Decision reserved.			
6-8-72	By DOOLING, J.- MEMORANDUM dated 6-6-72 filed, incorporating findings of fact and ORDER. It is ORDERED that the plttf's motions brought on by orders to show cause dated 5-4- and 5-17, are in all respects denied. (P/C mailed to attys)			51
6-8-72	By DOOLING, J.- Memorandum to all counsel: re: correction of memorandum and order of June 6, 1972. The file copy has been corrected accordingly.			52
6-8-72	NOTICE OF APPEAL FILED. with affid. of service. Copy mailed to C/ A.			53
6-13-72	Stenographer's transcript filed.			54
6/15/72	Certified copy of order of C. of A. denying plttf-appellant's motion for temporary restraining order & granting deft- appellees' motions for dismissal of appeal filed.			55
7-6-72	Correction of errors in Stenographer's transcript paper #54 filed.			56
7-10-72	Record on appeal certified and mailed to Court of Appeals.			
7-10-72	Letter filed, noting change of address for plttf. Pro Se.			57

68-C-643 MARSHAL P. SAFIE, et al v. JAMES W. GULICK etc.

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
7-13-72	Receipt returned from C/A acknowledging receipt of record, filed.			58
1/3/73	Certified copy of C of A order affirming the order of this court with costs to be taxed against appellant filed.			59
4/6/73	Record on appeal received from C of A. Acknowledgement mailed to clerk, C of A for receipt.			
4/5/74	Affidavit of Marshall P. Safir and Motion for Modification filed.			60
4-24-74	Notice of substitution of debts filed.			61
4-24-74	Memorandum and reply affidavit of Gilbert Fleischer to plttf's motion for modification filed.			62/63
4/24/74	Memorandum in Opposition to Plttf's motion to expand scope of injunction filed.			64
4-25-74	Copy of letter from Gilbert S. Fleischer to Kominers, et al dtd 4-10-74 filed.			65
4-25-74	Memorandum in opposition to plttf's motion to expand scope of injunction filed.			66
4-25-74	Affidavit of Stuart R. Breidbart in opposition to motion for modification filed.			67
4/29/74	Before DOOLING, J.--Case called. Plttf's motion for an injunction argued. Decision reserved.			
5/1/74	By DOOLING, J.--Memorandum and order dtd 4/30/74 that the motion for modification is denied filed.			68
5/2/74	Stenographer's transcript dtd 4/29/74 filed.			69
5/2/74	Letter of Thomas M. Dyer to Judge Dooling dtd 4/30/74 re: Judge Robinson's decision filed.			70
5-15-74	Notice of appeal filed. Duplicate mailed to C of A & debts. jn			71
6-11-74	Certified copy of judgment received from C of A affirming judgment of district court filed. jn			72
9/20/74	Notice of Motion, re: 10/4/74 filed re: relieving the Maritime Administrator, etc. Filed.			73
9/20/74	Memorandum of the Govt in Support of Motion under Rule 60(b)(5) of the F.R.C.P. filed.			74
9-30-74	Memorandum in support of govt's motion to dissolve injunctive order of 7-26-71 filed.			75
10/1/74	Memorandum of Intervenor Prudential Grace Lines Inc. on debts motion to dissolve injunction filed.			76

CONTINUED

CIVIL DOCKET

68 C 643 MARSHAL P. SAFIE, ET AL VS. JAMES W. GULICK, ETC.

DATE	FILINGS--PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN ENCLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
10/7/74	Before DOOLING, J. - Case called- Motion argued- Motion granted- Memorandum and Order to Follow			
10/11/74	By DOOLING, J. - Order dated Oct. 4, 1974 filed that the injunction of June 22, 1971, July 26, 1971 is deemed satisfied and of no effect further effect. (On back of Document # 73)			XXX
11-13-75	Pltff's motion for release of security deposit, ret 11-26-75, at 4:30 P.M. filed.			77
11-21-75	Letter dtd 1-20-75 to J. Dooling, from Elmer C. Maddy filed.			78
11/25/75	Letter of debts in Opposition to Pltff's motion for release of security deposit filed.			79
11-26-75	Letter from Elmer C. Maddy dtd 11-25-75 filed.			80
12-3-75	By DOOLING, J. - Memorandum and Order dtd 12-2-75 that the plttf's motion to release his \$5000 security deposit is granted, to take effect 12-15-75 filed. (p/c mailed)			81
9-13-77	Notice of motion ret 9-23-77 to consolidate this action with 77C 1093 filed with affidavit and affidavit of service. mg			82/83/84
10-18-77	Notice of motion ret. 10-28-77 for an order granting summary judgment in favor of debts and memo of law in support of motion filed. of motion ret 10/28/77			85/86 1
10/19/77	Notice by the NON-TRADE LINES AMERICAN PRESIDENT LINES, LTD. FARRELL LINES, INC. PRUDENTIAL LINES INC. & PSS STEAMSHIP CO., INC. to DISMISS or Alternatively for SUMMARY JUDGMENT in 77 C 1093 and of opposition to plttf's motion to amend complaint in 68 C-643 filed and MEMORANDUM of the above in support of motion to dismiss or alternatively for summary judgment & in opposition to plttf's motion to amend the complaint in 68-C 643. filed.			(87 & 88)
10/21/77	Affidavit dtd 10/19/77 of G.S. Fleischer, atty for Admiralty and shopping section, U.S. Dept of Justice, filed. jm			(89)
10/21/77	Memorandum of U.S.A. in opposition to plttf's motion to consolidate and amend filed. jm			(90)
10.27/77	Reply to opposition to motion to amend and consolidate filed.		tk	(91)
11-5-77	Memorandum in reply to opposition to motion to amend and consolidate and to motion for summary judgment filed.		ld	(92)
11/10/77	Supplemental reply in opposition to motion for summary judgment filed in 77 C 1093.		tk	----
12/7/77	By Dooling, J. - Order to show cause for preliminary interlocutory injunction with temporary restraining Order, dtd 12/6/77, filed. jm			See 1093 100
12-13-77	Affidavit of Reigh F. Klann in opposition to plttf's motion for an injunction filed with notice of Special Counsel for American Export and memorandum in opposition. See 77C 1093. mg			

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
12/13-77	Supp. affidavit of S. Crimins in opposition to Safir's motion for an injunction filed. fy See 77C 1093			(94)
12/13/77	Before DOOLING, J. Case called. Hearing on ORDER to SHOW CAUSE begun. Hearing concluded, adjourned w/o date.			
12/22-77	Judgment that the motions of debts for summary judgment in 77-C-1093 are granted; that the motion of the plttf to amend the complaint in 68-C-643 and to consolidate that action with 77-C-1093 is denied; and that the plttf shall nothing of the debts in 77-C-1093 and that the action is dismissed for want of jurisdiction filed. (93)			
12/13/77	By Dooling, J.—Memorandum and Order that motions of debt for summary judgement in 77C1093 Granted. and Motion of plttf to amend complaint in 68C643 and to consolidate that action with 77C1093 Denied. Further that clerk directed to enter judgement that plttf take nothing in 77C1093 and action is dismissed for want of jurisdiction, filed. jmdtd 12/20/77 (see # 25 of 77C1093)			
12/23/77	Notice of Appeal filed by plttf. from MEMO & ORDER denying motion to amend and consolidate entered in this action dtd 12/20/77 filed. Copy mailed to C. of A. and docket entries forwarded. Copy of notice of appeal mailed to attys. (SEE ATTACHED LIST in 77-C-1093 's notice of appeal, document # 26)			(94) E.
1/25/78	Sten. transcript dtd 12-13-77 filed. mg See 77C 1093.			

